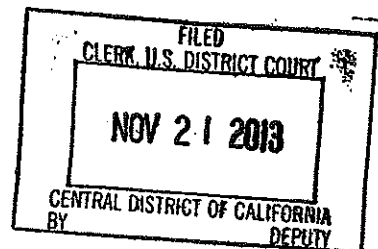


COPY



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7 Attorneys for Defendant CROSSMARK, INC.

8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

10  
11 GAYLE SMITH, an individually, and on  
12 behalf of other members of the general  
public similarly situated,

13 Plaintiff,

14 vs.

15 CROSSMARK, INC., a Delaware  
16 Corporation, and DOES 1-10, inclusive,

17 Defendant.

Case No.

**13-08624**

*R*  
*(VBK)*

**DEFENDANT CROSSMARK, INC.'S  
NOTICE OF REMOVAL**

Action Filed: October 9, 2013  
Date Removed: November 21, 2013  
Trial Date: None Set

1 **TO THE CLERK OF THE ABOVE-ENTITLED COURT AND PLAINTIFF**  
2 **GAYLE SMITH AND HER ATTORNEYS OF RECORD:**

3 PLEASE TAKE NOTICE THAT Defendant CROSSMARK, Inc.  
4 ("CROSSMARK" or "Defendant"), by and through its undersigned counsel, hereby  
5 removes this action to this Court pursuant to 28 U.S.C. §§ 1441 and 1453. In  
6 support of such removal, Defendant states as follows:

7 1. Plaintiff filed this civil action in the Superior Court of Los Angeles  
8 County, State of California ("Superior Court"), on or about October 9, 2013 (the  
9 "Action"). The Action was assigned Case No. BC523981. Plaintiff served  
10 CROSSMARK with the Complaint via its registered agent on October 22, 2013.  
11 Copies of the Summons and Complaint and supporting papers are attached hereto as  
12 **Exhibit A**. Defendant timely filed an Answer and Affirmative Defenses ("Answer")  
13 to the Complaint on November 20, 2013. A copy of the Answer is attached hereto as  
14 **Exhibit B**. Defendant is unaware of any other documents on file with the Superior  
15 Court in this action. This Notice of Removal is timely as it was filed within 30 days  
16 of service of the Complaint.

17 2. The Action was pending in the Superior Court which is in the territory  
18 of United States District Court for the Central District of California, Western  
19 Division ("Central District").

20 3. Under the Class Action Fairness Act, 28 U.S.C. § 1332(d) ("CAFA"),  
21 federal district courts have original jurisdiction over a class action if (1) it involves  
22 100 or more putative class members, (2) any class member is a citizen of a state  
23 different from any defendant, and (3) the aggregated controversy exceeds \$5 million.  
24 28 U.S.C. §§ 1332(d)(2) and (d)(6). This Action is one over which this Court has  
25 original jurisdiction under 28 U.S.C. §1332 and is one which may be removed by  
26 Defendant pursuant to 28 U.S.C. §§ 1441 and 1453, because: (1) the number of  
27 putative class members in the plaintiff class exceeds 100; (2) the amount in  
28 controversy exceeds \$5 million; and (3) there exists minimal diversity between the

1 plaintiff and defendant. 28 U.S.C. § 1332(d)(2), (6).

2       4.     The *Mitchell* class-action settlement.     CROSSMARK previously  
3 litigated and settled a class action lawsuit in the Central District involving the same  
4 putative class and overlapping wage-and-hour claims as alleged by Plaintiff in  
5 *Mitchell v. CROSSMARK, Inc. et. al*, Case No. CV 11- 2818-JAK (FMOx)  
6 (hereinafter, “*Mitchell*”). A true and correct copy of the Joint Stipulation of  
7 Settlement and Release in the *Mitchell* action is attached hereto as **Exhibit C**.  
8 Specifically, the operative complaint in *Mitchell* alleged “causes of action under the  
9 California Labor Code and Business & Professions Code: violation of Labor Code  
10 §§ 201-203 for failure to pay wages due at separation of employment, Labor Code §  
11 204 for failure to pay all wages timely throughout the course of employment, Labor  
12 Code §§ 510 and 1194 for failure to pay all wages due for time spent driving  
13 between work locations, Labor Code § 226 and IWC Wage Order 4-2001(7) for  
14 failure to issue accurately itemized employee wage statements, Labor Code § 2802  
15 for failure to fully reimburse employee business expenses incurred in the discharge  
16 of their employment duties, including while driving for work purposes, and violation  
17 of Bus. & Prof. Code §§ 17200 *et seq.* Plaintiff s[ought] damages, restitution, civil  
18 penalties under PAGA, and injunctive relief.” (*Mitchell* Settlement Agreement at ¶  
19 II.34). The Settlement Class in *Mitchell* was comprised of “all persons who are,  
20 have been or will be employed by Defendants in the State of California as an hourly,  
21 non-exempt employee from October 8, 2006 through the date of Preliminary  
22 Approval of this Settlement.” (*Mitchell* Settlement Agreement ¶ I.3). The Court in  
23 *Mitchell* granted preliminary approval of the Settlement on February 27, 2012 and  
24 final approval of the Settlement on June 25, 2012. Given the preclusive effect of  
25 *Mitchell* on Plaintiff’s lawsuit, the alleged claims in the Complaint are limited to the  
26 period from February 28, 2012 to the present. *See, e.g., Hesse v. Sprint Corporation*,  
27 598 F.3d 581 (9th Cir. 2010); *Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d  
28 741 (9th Cir. 2006); *Kourtis v. Cameron*, 419 F.3d 989, 994 (9th Cir. 2005); *see also*

1 *See Villacres v. ABM Industries Inc.*, 189 Cal. App. 4th 562 (2010).

2       5.     The putative class consists of more than 100 members. Plaintiff seeks  
3 to bring this action on behalf of “all non-exempt or hourly paid who have been  
4 employed by DEFENDANT in the State of California in the position of Territory  
5 Retail Representative, Merchandiser,<sup>1</sup> Data Collector or those positions with similar  
6 duties and/or titles, within four years prior to the filing of this complaint until  
7 resolution of this lawsuit.” (Complaint at ¶14).

8       6.     Defendant CROSSMARK’s records indicate that at least 1,778  
9 individuals were employed as non-exempt or hourly Retail Representatives and/or  
10 Data Collectors in California by CROSSMARK from February 28, 2012 to the  
11 present. (Declaration of Melanie Stewart filed concurrently herewith (“Stewart  
12 Decl.”) ¶ 3). As alleged, all of these individuals are potential members of the  
13 putative classes. Therefore, this action is a class action pursuant to 28 U.S.C. §  
14 1332(d).

15       7.     Minimal diversity exists between the parties. The named plaintiff is  
16 alleged to be a resident of California. (Complaint at ¶5.) Based on Defendant  
17 CROSSMARK’s records, at all times during her employment with Defendant  
18 CROSSMARK, the named plaintiff maintained an address in California. (Stewart  
19 Decl. ¶ 9.) Members of the putative class, who are or were employed in California,  
20 are presumed to be primarily citizens of the State of California. Defendant  
21 CROSSMARK was, at the time of the filing of this action, and still is, a corporation  
22 incorporated under the laws of the State of Delaware. (Declaration of John A.  
23 Thompson, ¶ 3.) Its principal place of business was, at the time of the filing of this  
24 action, and still is, in the State of Texas. (*Id.* at ¶ 4.) Pursuant to 28 U.S.C.  
25 § 1332(c), “a corporation shall be deemed to be a citizen of any State by which it has

26  
27 <sup>1</sup> Defendant CROSSMARK does not use the term “merchandiser” internally, but on  
28 information and belief, the term “merchandiser” is an industry word that refers to  
retail representatives. (*See* Stewart Decl. at ¶ 3.)

1 been incorporated and of the State where it has its principal place of business.”  
 2 CROSSMARK’s principal place of business and current operations are located in the  
 3 state of Texas because its headquarters, and its executive and senior management  
 4 personnel, as well as its primary management operations, are located in Texas. (*Id.*  
 5 at ¶ 5). *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1093 (9th Cir. 1990)  
 6 (providing that where a corporation does business in a number of states and does not  
 7 conduct the substantial predominance of its business in any single one, the state  
 8 where corporate headquarters is located is the corporation’s principal place of  
 9 business); *Hertz Corp. v. Friend*, 130 S.Ct. 1181 (2010) (in determining the principal  
 10 place of business of a corporation for purposes of diversity jurisdiction, the  
 11 “‘principal place of business’ [as contained in § 1332(c)] is best read as referring to  
 12 the place where a corporation’s officers direct, control, and coordinate the  
 13 corporation’s activities.”). Accordingly, CROSSMARK is not a citizen of the State  
 14 of California.

15 8. Because Plaintiff is a resident of California and CROSSMARK is not,  
 16 the minimal diversity requirement of 28 U.S.C. § 1332(d)(2)(A) is satisfied.

17 9. The amount in controversy for all putative class members exceeds \$5  
 18 million. While Defendant denies the validity of Plaintiff’s claims and requests for  
 19 relief, the facial allegations in the Complaint and the *alleged damages* of Plaintiff  
 20 exceeds the jurisdictional minimum. *Luckett v. Delta Airlines, Inc.*, 171 F.3d 295,  
 21 298 (5th Cir. 1999) (finding that facts presented in the notice of removal, combined  
 22 with plaintiff’s allegations, were sufficient to support finding of jurisdiction);  
 23 *DeAguillar v. Boeing Co.*, 47 F.3d 1404, 1412 (5th Cir. 1995) (stating that  
 24 “defendant can show by a preponderance of the evidence that the amount in  
 25 controversy is greater than the jurisdictional amount”); *accord Gaus v. Miles, Inc.*,  
 26 980 F.2d 564, 566-67 (9th Cir. 1992); *White v. FCI USA, Inc.*, 319 F.3d 672, 674  
 27 (5th Cir. 2003) (facially apparent from the lengthy list of damages, combined with a  
 28 claim for attorney’s fees, that plaintiff’s claim exceeded the jurisdictional threshold).

1 Defendant discusses *infra* the allegations in Plaintiff's Complaint that are the subject  
2 of this matter solely to demonstrate that the amount in controversy in this matter  
3 exceeds \$5,000,000.00. In doing so, Defendant does not admit that Plaintiff is  
4 entitled to these damages or that Plaintiff will be able to recover under any of her  
5 theories.

6 10. In determining the amount in controversy for CAFA, all potential  
7 damages based on the claims in the Complaint, as well as attorney's fees, are  
8 included. *Guglielmino v. McKee Foods Corp.*, 506 F.3d 696, 701 (9<sup>th</sup> Cir. 2007)  
9 (unspecified attorney's fees are appropriately counted toward the amount in  
10 controversy in CAFA removal actions); *Muniz v. Pilot Travel Centers LLC*, 2007  
11 WL 1302504, \*3 (E.D. Cal., May 1, 2007) (slip copy) ("In measuring the amount in  
12 controversy, a court must assume that the allegations of the complaint are true and  
13 that a jury will return a verdict for the plaintiffs on all claims made in the  
14 complaint.").

15 11. Plaintiff's Complaint asserts causes of action against Defendant for  
16 alleged violations of California Labor Code §§ 1194, 223, 510, 1198, 226.7(a),  
17 512(a), 226(a), 2800, 2802, 202, 203, and California Business and Professions Code  
18 § 17200. (Complaint, generally). Plaintiff seeks, *inter alia*, unpaid minimum wages,  
19 unpaid overtime wages, unpaid missed meal and rest period premiums, unpaid  
20 business-related expenses, statutory penalties, and attorneys' fees on behalf of  
21 herself and the putative class members. (*See generally* Complaint, Prayer for  
22 Relief).

23 12. As noted above, CROSSMARK employed at least 1,778 individuals as  
24 non-exempt or hourly Retail Representatives and/or Data Collectors in California  
25 from February 28, 2012 to the present. (Stewart Decl. ¶ 3.) From February 28, 2012  
26 to October 21, 2013 (*i.e.*, thirty (30) days prior to the filing of this removal petition),  
27 994 putative class members ended their employment with CROSSMARK. (Stewart  
28 Decl. ¶ 4).



1        13. All of CROSSMARK's non-exempt employees working in California  
 2 are paid on a weekly basis (*i.e.*, 52 times per year). (Stewart Decl. ¶ 6). From  
 3 October 9, 2012, through the to the present (which is only one year prior to the filing  
 4 of the instant lawsuit), the putative class received 46,014 weekly wage statements for  
 5 weeks worked and earned an average hourly wage of \$11.34. (Stewart Decl., ¶¶ 5,  
 6 7.)

7        14. Unpaid wages for "off-the-clock" work. In her Complaint, Plaintiff  
 8 alleges that CROSSMARK required Plaintiff and the putative class to engage in  
 9 numerous daily tasks while "off-the-clock," including (a) answering emails, (b)  
 10 downloading schedules, project assignments, and instructions before the workday,  
 11 and (c) uploading questionnaires, digital pictures, comments and reports after the  
 12 workday. (Complaint, ¶¶ 21-25.) Plaintiff further alleges that "[t]hese unpaid job  
 13 requirements took between *one (1) to four (4) or more hours to complete each day.*"  
 14 (*Id.* at ¶ 25 (emphasis added).) Based on these allegations, Plaintiff seeks unpaid  
 15 wages for herself and the putative class. Assuming conservatively that each putative  
 16 class member worked one (1) hour "off the clock" each workday (*i.e.*, five unpaid  
 17 hours each workweek) from only October 9, 2012 through the present, the total  
 18 amount of unpaid wages is at least **\$2,608,993.80** (*i.e.*, 5 hours x \$11.34 per hour x  
 19 46,014 weekly wage statements for weeks worked).

20        15. Inaccurate Wage Statement Statutory Penalties. In addition, Plaintiff  
 21 alleges that CROSSMARK failed to provide employees with complete and accurate  
 22 wage statements that included the total number of hours worked by Plaintiff and the  
 23 putative class. (Complaint, ¶ 93.) Further, as discussed *supra*, Plaintiff alleges that  
 24 she and the putative class worked between one to four "off-the-clock" hours per  
 25 week which, by definition, were not reflected on Plaintiff and the putative class'  
 26 respective wage statements. (*Id.* at ¶¶ 21-25.) Based on these allegations, Plaintiff  
 27 seeks statutory penalties for herself and the putative class pursuant to Labor Code  
 28 section 226(e)(1) which provides for a \$50.00 statutory penalty per wage statement

1 “for the initial pay period in which a violation occurs” and a \$100 statutory penalty  
 2 per wage statement “for each violation in a subsequent pay period.” As is discussed  
 3 *supra*, all of CROSSMARK’s non-exempt employees working in California are paid  
 4 on a weekly basis (*i.e.*, 52 times per year). (Stewart Decl. ¶ 6). Further, as is also  
 5 discussed *supra*, between October 9, 2012 and November 18, 2013, CROSSMARK  
 6 issued a total of 46,014 weekly wage statements to Plaintiff and the putative class.  
 7 (Stewart Decl., ¶ 7). Assuming conservatively that Plaintiff and the putative class  
 8 would seek only a \$50.00 statutory penalty for each allegedly inaccurate wage  
 9 statement, the total amount of statutory penalties potentially available to Plaintiff and  
 10 the putative class is **\$2,300,700.00** (46,014 wage statements x \$50.00 statutory  
 11 penalty per wage statement).

12 16. Waiting-time penalties. Plaintiff’s Complaint also alleges that  
 13 CROSSMARK failed to timely pay all wages due employees at the time of  
 14 termination in violation of Labor Code Section 203. (Complaint, ¶¶ 108-110.)  
 15 Labor Code Section 203 provides that “[i]f an employer willfully fails to pay . . . any  
 16 wages of an employee who is discharged or who quits, the wages of the employee  
 17 shall continue as a penalty from the due date thereof at the same rate until paid or  
 18 until an action therefor is commenced; but the wages shall not continue for more  
 19 than 30 days.” Based on the number of employees whose employment ended from  
 20 February 28, 2012 to October 21, 2013 (*i.e.*, 30 days prior to the filing of this  
 21 removal petition), the total amount of waiting-time penalties potentially due all  
 22 terminated employees is **\$2,705,270.40** (*i.e.*, 8 hours per day x \$11.34 per hour x 30  
 23 days x 994 terminated employees).

24 17. Plaintiff’s Complaint also seeks numerous other forms of compensatory  
 25 damages, penalties, and attorneys’ fees for unpaid overtime (Third Cause of Action),  
 26 unpaid meal and rest break premiums (Fourth and Fifth Causes of Action), and  
 27 unpaid business-related expenses (Seventh Cause of Action). Although including  
 28 these damages, penalties, and fees would significantly increase the amount in



1 controversy, in an effort to be conservative, CROSSMARK has not included these  
2 claims in its removal petition.

3 18. The total amount in controversy, limited only to Plaintiff's claims for  
4 unpaid wages due to working "off-the-clock", statutory penalties for allegedly  
5 inaccurate wage statements and waiting-time-penalties discussed above, is  
6 \$7,614,964.42. Although Defendant specifically denies Plaintiff's claims and denies  
7 that Plaintiff will recover any of the relief she seeks, it is clear from the scope of the  
8 relief sought that the amount in controversy arising from Plaintiff's Complaint  
9 exceeds the \$5,000,000.00 jurisdictional threshold for removal under CAFA. See 28  
10 U.S.C. § 1332(d).

11 19. As required by 28 U.S.C. §1446(d), a copy of the original Notice of  
12 Removal will be filed with the Superior Court for the County of Los Angeles. A true  
13 and correct copy of the Notice of Removal, to be filed in Los Angeles County  
14 Superior Court, without the exhibits, is attached hereto as **Exhibit D**.

15  
16 DATED: November 21, 2013

OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.

17  
18  
19 By: 

20 Rafael G. Nendel-Flores  
21 Allison Eckstrom  
22 Lara C. de Leon

23 Attorneys for Defendant CROSSMARK,  
24 INC.

# EXHIBIT A

# SUMMONS (CITACION JUDICIAL)

SUM-100

FOR COURT USE ONLY  
(SOLO PARA USO DE LA CORTE)CONFORMED COPY  
ORIGINAL FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

OCT 09 2013

John A. Clarke, Executive Officer/Clerk  
By Amber Hayes, DeputyNOTICE TO DEFENDANT:  
(AVISO AL DEMANDADO):CROSSMARK, INC., a Delaware Corporation, and DOES 1-10,  
inclusive,YOU ARE BEING SUED BY PLAINTIFF:  
(LO ESTÁ DEMANDANDO EL DEMANDANTE):GAYLE SMITH, individually, and on behalf of other members of the John A. Clarke, Executive Officer/Clerk  
general public similarly situated, By Amber Hayes, Deputy

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), the California Courts Online Self-Help Center ([www.courtinfo.ca.gov/selfhelp](http://www.courtinfo.ca.gov/selfhelp)), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of \$10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.

AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, ([www.lawhelpcalifornia.org](http://www.lawhelpcalifornia.org)), en el Centro de Ayuda de las Cortes de California, ([www.sucorte.ca.gov](http://www.sucorte.ca.gov)) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de \$10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desecher el caso.

The name and address of the court is:  
(El nombre y dirección de la corte es): Los Angeles Superior Court  
111 N. Hill Street, Los Angeles, CA 90012

CASE NUMBER:  
(Número del Caso):

BC523981

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:  
(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):  
Kawahito Shraga & Westrick LLP, 1990 S. Bundy, Suite 280, Los Angeles, CA 90025

DATE:  
(Fecha)Clerk, by  
(Secretario)

Amber Hayes

Deputy  
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).

NOTICE TO THE PERSON SERVED: You are served

- ☐ as an individual defendant.
- ☐ as the person sued under the fictitious name of (specify):

- ☒ on behalf of (specify): CROSSMARK INC., a Delaware Corporation,  
and DOES 1-10, inclusive

- under: ☒ CCP 416.10 (corporation) ☐ CCP 416.60 (minor)  
☐ CCP 416.20 (defunct corporation) ☐ CCP 416.70 (conservatee)  
☐ CCP 416.40 (association or partnership) ☐ CCP 416.90 (authorized person)  
☐ other (specify):

- ☐ by personal delivery on (date):

OCT 09 2013

**SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES**  
**NOTICE OF CASE ASSIGNMENT – CLASS ACTION CASES**  
Case Number \_\_\_\_\_

BC 523981

**THIS FORM IS TO BE SERVED WITH THE SUMMONS AND COMPLAINT**  
Your case is assigned for all purposes to the judicial officer indicated below (Local Rule 3.3(e)).

ASSIGNED JUDGE	DEPT	ROOM
Judge Elihu M. Berle	323	1707
Judge Lee Smalley Edmon	322	1702
Judge John Shepard Wiley, Jr.	311	1408
Judge Kenneth Freeman	310	1412
Judge Jane Johnson	308	1415
✓ Judge William F. Highberger	307	1402
OTHER		

**Instructions for handling Class Action Civil Cases**

The following critical provisions of the Chapter Three Rules, as applicable in the Central District, are summarized for your assistance.

**APPLICATION**

The Chapter Three Rules were effective January 1, 1994. They apply to all general civil cases.

**PRIORITY OVER OTHER RULES**

The Chapter Three Rules shall have priority over all other Local Rules to the extent the others are inconsistent.

**CHALLENGE TO ASSIGNED JUDGE**

A challenge under Code of Civil Procedure section 170.6 must be made within 15 days after notice of assignment for all purposes to a judge, or if a party has not yet appeared, within 15 days of the first appearance.

**TIME STANDARDS**

Cases assigned to the Individual Calendaring Court will be subject to processing under the following time standards:

**COMPLAINTS:** All complaints shall be served within 60 days of filing and proof of service shall be filed within 90 days of filing.

**CROSS-COMPLAINTS:** Without leave of court first being obtained, no cross-complaint may be filed by any party after their answer is filed. Cross-complaints shall be served within 30 days of the filing date and a proof of service filed within 60 days of the filing date.

A Status Conference will be scheduled by the assigned Independent Calendar Judge no later than 270 days after the filing of the complaint. Counsel must be fully prepared to discuss the following issues: alternative dispute resolution, bifurcation, settlement, trial date, and expert witnesses.

**FINAL STATUS CONFERENCE**

The Court will require the parties at a status conference not more than 10 days before the trial to have timely filed and served all motions in limine, bifurcation motions, statements of major evidentiary issues, dispositive motions, requested jury instructions, and special jury instructions and special jury verdicts. These matters may be heard and resolved at this conference. At least 5 days before this conference, counsel must also have exchanged lists of exhibits and witnesses and have submitted to the court a brief statement of the case to be read to the jury panel as required by Chapter Eight of the Los Angeles Superior Court Rules.

**SANCTIONS**

The court will impose appropriate sanctions for the failure or refusal to comply with Chapter Three Rules, orders made by the Court, and time standards or deadlines established by the Court or by the Chapter Three Rules. Such sanctions may be on a party or if appropriate on counsel for the party.

This is not a complete delineation of the Chapter Three Rules, and adherence only to the above provisions is therefore not a guarantee against the imposition of sanctions under Trial Court Delay Reduction. Careful reading and compliance with the applicable Chapter Rules is absolutely imperative.

Given to the Plaintiff/Cross-Complainant/Attorney of Record on \_\_\_\_\_ Sherri R. Carter, Executive Officer/Clerk

By Ambor Hayes, Deputy Clerk

COPY

1 KAWAHITO SHRAGA & WESTRICK LLP  
 2 SHAWN C. WESTRICK (BAR NO. 235313)  
 3 TIMOTHY P. HENNESSY (BAR NO. 286317)  
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10 Attorneys for Plaintiff and Class Members

11  
 12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
 13 **COUNTY OF LOS ANGELES**

14 GAYLE SMITH, individually, and on behalf of  
 15 other members of the general public similarly  
 16 situated,

17 Plaintiff,

18 vs.

19 CROSSMARK, INC., a Delaware Corporation,  
 20 and DOES 1-10, inclusive,

21 Defendants.

CONFORMED COPY  
 ORIGINAL FILED  
 SUPERIOR COURT OF CALIFORNIA  
 COUNTY OF LOS ANGELES

OCT 09 2013

John A. Clarke, Executive Officer/Clerk  
 By Amber Hayes, Deputy

Case No.

BC523981

**CLASS ACTION COMPLAINT**

(1) Violation of California Labor Code § 1194  
 (Unpaid Minimum Wage)

(2) Violation of California Labor Code § 223  
 (Failure to Pay Agreed Upon Wages)

(3) Violation of California Labor Code §§ 510  
 and 1198 (Failure to Pay Overtime);

(4) Violation of California Labor Code §§  
 226.7(a) and 512(a) (Denial of Meal Breaks);

(5) Violation of California Labor Code  
 § 226.7(a) (Denial of Rest Breaks);

(6) Violation of California Labor Code §  
 226(a) (Improper Wage Statements);

(7) Violation of California Labor Code §§  
 2800 and 2802 (Failure to Reimburse  
 Incidental Expenses);

(8) Violation of California Labor Code §§ 202  
 and 203 (Failure to Pay Owed Wages at  
 Termination);

(9) Violation of California Business &  
 Professions Code §§ 17200, et seq.

Jury Trial Demanded

1 PLAINTIFF GAYLE SMITH ("PLAINTIFF"), individually and on behalf of all other  
2 members of the public similarly situated, alleges as follows:

3 **JURISDICTION AND VENUE**

4 1) This Class Action Complaint is brought pursuant to California Code of Civil  
5 Procedure § 382. The monetary damages and restitution sought by PLAINTIFF exceeds the  
6 minimal jurisdiction limits of the Superior Court and will be established according to proof at trial.  
7 The amount in controversy for the class representative, including claims for compensatory  
8 damages and pro rata share of attorney fees, is less than \$75,000.

9 2) This Court has jurisdiction over this action pursuant to the California Constitution,  
10 Article VI, § 10, which grants the Superior Court "original jurisdiction in all causes except those  
11 given by statute to other courts." The statutes under which this action is brought do not specify  
12 any other basis for jurisdiction.

13 3) This Court has jurisdiction over DEFENDANT CROSSMARK, INC.  
14 ("DEFENDANT") because, upon information and belief, it has sufficient minimum contacts in  
15 California or otherwise intentionally avails itself of the California market so as to render the  
16 exercise of jurisdiction over it by the California courts consistent with traditional notions of fair  
17 play and substantial justice.

18 4) Venue is proper in this Court because, upon information and belief, the named  
19 DEFENDANT transacts business, has offices in this county, and the acts and omissions alleged  
20 herein took place in this county.

21 **THE PARTIES**

22 5) PLAINTIFF is a resident of Los Angeles County in the State of California.

23 6) DEFENDANT was and is, upon information and belief, a Delaware corporation  
24 doing business in California, and at all times hereinafter mentioned, an employer whose  
25 employees are engaged throughout this county, the State of California, and/or the various states of  
26 the United States of America.

27 7) PLAINTIFF is unaware of the true names or capacities of the DEFENDANTS sued  
28



1 herein under the fictitious names DOES 1-10, but prays for leave to amend and serve such  
 2 fictitiously named DEFENDANTS pursuant to California Code of Civil Procedure § 474 once  
 3 their names and capacities become known.

4 8) PLAINTIFF is informed and believes, and thereon alleges, that DOES 1-10 are the  
 5 partners, agents, owners, shareholders, managers or employees of DEFENDANT, and were acting  
 6 on behalf of DEFENDANT.

7 9) PLAINTIFF is informed and believes, and thereon alleges, that each and all of the  
 8 acts and omissions alleged herein was performed by, or is attributable to, DEFENDANT and  
 9 DOES 1-10 (collectively "DEFENDANTS"), each acting as the agent for the other, with legal  
 10 authority to act on the other's behalf. The acts of any and all DEFENDANTS were in accordance  
 11 with, and represent the official policy of, DEFENDANT.

12 10) At all times herein mentioned, DEFENDANTS, and each of them, ratified each and  
 13 every act or omission complained of herein. At all times herein mentioned, DEFENDANTS, and  
 14 each of them, aided and abetted the acts and omissions of each and all the other DEFENDANTS in  
 15 proximately causing the damages herein alleged.

16 11) PLAINTIFF is informed and believes, and thereon alleges, that each of said  
 17 DEFENDANTS is in some manner intentionally, negligently or otherwise responsible for the acts,  
 18 omissions, occurrences and transactions alleged herein.

#### 19 CLASS ACTION ALLEGATIONS

20 12) PLAINTIFF brings this action on her own behalf, as well as on behalf of each and  
 21 all other persons similarly situated, and thus seeks class certification under California Code of  
 22 Civil Procedure § 382.

23 13) All claims alleged herein arise under California law for which PLAINTIFF seeks  
 24 relief authorized by California law.

25 14) The proposed class is comprised of and defined as:  
 26 All non-exempt or hourly paid employees who have been employed by  
 27 DEFENDANT in the State of California in the position of Territory Retail  
 28

1 Representative, Merchandiser, Data Collector, or those positions with similar duties  
2 and/or similar titles, within four years prior to the filing of this complaint until  
3 resolution of this lawsuit.

4 15) There is a well-defined community of interest in the litigation and the class is easily  
5 ascertainable:

6 a. Numerosity: The members of the class are so numerous that joinder of all  
7 members would be unfeasible and impractical. The membership of the entire class is unknown to  
8 PLAINTIFF at this time, however, the class is estimated to be greater than 50 individuals and the  
9 identity of such membership is readily ascertainable by inspection of DEFENDANT'S  
10 employment records.

11 b. Typicality: PLAINTIFF is qualified to, and will, fairly and adequately  
12 protect the interests of each class member with whom she has a well-defined community of  
13 interest, and PLAINTIFF'S claims (or defenses, if any) are typical of all class members' as  
14 demonstrated herein.

15 c. Adequacy: PLAINTIFF is qualified to, and will, fairly and adequately,  
16 protect the interests of each class member with whom she has a well-defined community of  
17 interest and typicality of claims, as demonstrated herein. PLAINTIFF acknowledges that she has  
18 an obligation to make known to the Court any relationship, conflicts or differences with any class  
19 member. PLAINTIFF'S attorneys and the proposed class counsel are versed in the rules  
20 governing class action discovery, certification, and settlement. PLAINTIFF has incurred, and  
21 throughout the duration of this action will continue to incur, costs and attorneys' fees that have  
22 been, are, and will be necessarily expended for the prosecution of this action for the substantial  
23 benefit of each class member.

24 d. Superiority: The nature of this action makes the use of class action  
25 adjudication superior to other methods. A class action will achieve economies of time, effort and  
26 expense as compared to separate lawsuits, and will avoid inconsistent outcomes because the same  
27 issues can be adjudicated in the same manner and at the same time for the entire class.

1 e. Public Policy Considerations: Employers of this state violate employment  
 2 and labor laws every day. Current employees are often afraid to assert their rights out of fear of  
 3 direct or indirect retaliation. Former employees are fearful of bringing actions because they  
 4 believe their former employers may damage their future endeavors through negative references  
 5 and/or other means. Class actions provide the class members who are not named in the complaint  
 6 with a type of anonymity that allows for the vindication of their rights while protecting their  
 7 privacy.

8 16) There are common questions of law and fact as to the class that predominate over  
 9 questions affecting only individual members, including but not limited to:

10 a. Whether DEFENDANT'S failure to pay wages, without abatement or  
 11 reduction, in accordance with the California Labor Code, was willful;

12 b. Whether DEFENDANT deprived PLAINTIFF and the other class members  
 13 of meal periods or required PLAINTIFF and the class members to work during meal periods  
 14 without compensation pursuant to California Labor Code section 226.7;

15 c. Whether DEFENDANT deprived PLAINTIFF and the other class members  
 16 of rest periods or required PLAINTIFF and the class members to work during rest periods without  
 17 compensation pursuant to California Labor Code section 226.7;

18 d. Whether DEFENDANT complied with wage reporting as required by the  
 19 California Labor Code; including but not limited to section 226;

20 e. Whether DEFENDANT did not reimburse, and/or failed to reimburse  
 21 correctly, PLAINTIFF and other class members for out of pocket expenses actually and  
 22 necessarily incurred while discharging their duties pursuant to California Labor Code section 2800  
 23 and 2802;

24 f. Whether DEFENDANT failed to pay all overtime owed to PLAINTIFF and  
 25 the other class members;

26 g. Whether DEFENDANT engaged in unfair business practices in violation of  
 27 California Business & Professions Code sections 17200, et seq.; and,  
 28

h. The appropriate amount of damages, restitution, or monetary penalties resulting from DEFENDANT'S violations of California law.

**GENERAL ALLEGATIONS**

17) At all times set forth, DEFENDANT employed PLAINTIFF and other persons as non-exempt or hourly paid employees.

18) DEFENDANT provides a merchandising service for product manufactures. This entails sending Territory Retail Representatives from store to store to help ensure that clients' products are stocked and displayed in the required manner and that current promotions are being followed.

19) DEFENDANT currently employs PLAINTIFF as a Territory Retail Representative at DEFENDANT'S Anaheim, California business location. PLAINTIFF began employment with DEFENDANT on or around January of 2012.

20) DEFENDANT pays PLAINTIFF and other class members a flat hourly rate.

21) In order for PLAINTIFF and other class members to be prepared for their workday, DEFENDANT required PLAINTIFF and other class members, while off-duty and not being paid, to log onto the CROSSMARK website to answer emails and download schedules, project assignments and instructions needed for each workday.

22) PLAINTIFF and other class members could only learn of their daily and weekly projects, as well as necessary instructions, through logging onto the CROSSMARK website.

23) After PLAINTIFF and other class members would leave their last assignment, and were considered "off the clock" and not being paid, DEFENDANT required that PLAINTIFF and other class members log onto the CROSSMARK website to upload questionnaires, digital pictures, comments, and reports of PLAINTIFF and class members' completed work.

24) DEFENDANT did not consider the assigned daily tasks complete until PLAINTIFF and other class members uploaded the required materials. It was mandatory.

25) DEFENDANT did not compensate PLAINTIFF and other class members for the hours spent on the CROSSMARK website downloading assignment information before the

1 workday and uploading project related questionnaires and photos of completed work after each  
2 workday. These unpaid job requirements took between one (1) to four (4) or more hours to  
3 complete each day.

4 26) DEFENDANT also did not account for these hours when calculating overtime.

5 27) DEFENDANT did not reimburse, or failed to reimburse correctly, PLAINTIFF and  
6 other class members for out of pocket expenses actually and necessarily incurred while  
7 discharging their duties. This includes, but is not limited to: money spent on paper needed to print  
8 daily reports; money spent on digital cameras needed to take pictures of completed projects;  
9 money spent on cell phone service needed to respond to calls in the field throughout the day;  
10 money spent on obtaining internet service needed to download and upload required materials; and,  
11 mileage accumulated on their personal vehicles that were used throughout the course of the work-  
12 day.

13 28) DEFENDANT set a "budgeted" or "projected" number of hours that PLAINTIFF  
14 and other class members were permitted to spend on completing daily projects at retail stores.

15 29) The tasks at retail stores that PLAINTIFF and other class members were required to  
16 complete regularly took longer than the number of hours that DEFENDANT prescribed for the  
17 tasks, often resulting in PLAINTIFF and other class members working more than eight (8) hours  
18 in a day or forty (40) hours in a work week.

19 30) DEFENDANT would not voluntarily pay any overtime incurred due to having to  
20 work beyond the allotted time. PLAINTIFF would have to request an adjustment for the actual  
21 time already worked, which was subject to approval by a supervisor. PLAINTIFF is informed and  
22 believes that several times these adjustments were denied.

23 31) PLAINTIFF is informed and believes, and thereon alleges, that at all times herein  
24 mentioned, DEFENDANT was advised by skilled lawyers, professionals, employees, and  
25 knowledgeable advisors about California labor and wage law, employment and personnel  
26 practices, and about the requirements of California law.

27 32) PLAINTIFF is informed and believes, and thereon alleges, that DEFENDANT  
28

1 knew or should have known that PLAINTIFF and other class members were entitled to receive all  
2 the wages owed to them for the total number of hours worked.

3 33) PLAINTIFF is informed and believes, and thereon alleges, that DEFENDANT  
4 knew or should have known that PLAINTIFF and other class members were entitled to receive  
5 overtime pay for all remuneration.

6 34) PLAINTIFF is informed and believes, and thereon alleges, that DEFENDANT  
7 knew or should have known that PLAINTIFF and other class members were entitled to receive all  
8 meal breaks or payment of one hour of pay at PLAINTIFF and class members' regular rate of pay  
9 when a meal break was missed.

10 35) PLAINTIFF is informed and believes, and thereon alleges, that DEFENDANT  
11 knew or should have known that PLAINTIFF and other class members were entitled to receive all  
12 rest breaks or payment of one hour of pay at PLAINTIFF and class members' regular rate of pay  
13 when a rest break was missed.

14 36) PLAINTIFF is informed and believes, and thereon alleges, that DEFENDANT  
15 knew or should have known that PLAINTIFF and other class members were entitled to receive  
16 complete and accurate wage statements in accordance with California law.

17 37) PLAINTIFF is informed and believes, and thereon alleges, that at all times herein  
18 mentioned, DEFENDANT knew or should have known that it had a duty to fully compensate  
19 PLAINTIFF and other members of the class for expenses actually and necessarily incurred while  
20 discharging their duties.

21 38) PLAINTIFF is informed and believes, and thereon alleges, that at all times herein  
22 mentioned, DEFENDANT knew or should have known that it had a duty to compensate  
23 PLAINTIFF and other members of the class and had the financial ability to pay such  
24 compensation, but willfully, knowingly and intentionally failed to do so.

25 39) DEFENDANT continues to employ non-exempt or hourly paid employees within  
26 California.

27 40) California Labor Code section 218 states that nothing in Article 1 of the Labor  
28



1 Code shall limit the right of any wage claimant to "sue directly...for any wages or penalty due him  
2 [or her] under this article."

3 41) Pursuant to California Labor Code section 2699.3, PLAINTIFF provided written  
4 notice to the Labor and Workforce Development Agency; stating the specific alleged violations of  
5 the Labor Code and facts that support said allegations as well as informing the Labor and  
6 Workforce Development Agency that PLAINTIFF would seek to recover all civil penalties  
7 pursuant to California Labor Code section 2698 *et seq.*

### 8 FIRST CAUSE OF ACTION

#### 9 **Violation of California Labor Code § 1194**

10 42) PLAINTIFF incorporates by reference and re-alleges as if fully stated herein the  
11 material allegations set out in paragraphs 1 through 41.

12 43) California Labor Code section 218 authorizes employees to sue directly for any  
13 wages or penalties due to them under the Labor Code.

14 44) California Labor Code section 1194 provides that notwithstanding any agreement  
15 to work for a lesser wage, any employee receiving less than the legal minimum wage applicable to  
16 the employee is entitled to recover in a civil action the unpaid balance of the full amount of the  
17 applicable minimum wage, including interest thereon, reasonable attorneys' fees, and the costs of  
18 the lawsuit.

19 45) During the relevant time period, DEFENDANT willfully failed to pay PLAINTIFF  
20 and other class members the applicable minimum wage for the total number of hours spent  
21 completing assigned daily projects, as well as the time spent downloading and uploading required  
22 and necessary information from the CROSSMARK website while off the clock.

23 46) DEFENDANT'S willful failure to pay PLAINTIFF and other class members their  
24 applicable minimum wages for each hour worked during the workweek is in violation of  
25 California Labor Code section 1194, and is therefore unlawful.

26 47) Pursuant to California Labor Code section 1194, PLAINTIFF and other class  
27 members are entitled to recover their unpaid minimum wages, as well as interest, costs and  
28

attorneys' fees.

48) Pursuant to California Labor Code section 2698 *et seq.*, PLAINTIFF and other class members are entitled to recover all civil penalties owed to the Labor and Workforce Development Agency.

## **SECOND CAUSE OF ACTION**

### **Violation of California Labor Code § 223**

49) PLAINTIFF incorporates by reference and re-alleges as if fully stated herein the material allegations set out in paragraphs 1 through 48.

50) California Labor Code section 218 authorizes employees to sue directly for any wages or penalties due to them under the California Labor Code.

51) California Labor Code section 223 provides that it is unlawful for an employer to secretly pay a lower wage while purporting to pay the wage designated by contract.

52) During the relevant time period PLAINTIFF and other class members contracted with DEFENDANT to be paid an hourly wage for all time worked.

53) During the relevant time period, DEFENDANT willfully failed to pay PLAINTIFF and other class members the contracted for hourly wage for the total number of hours it took them to complete assigned daily tasks, instead paying them only for the prescribed number of hours that DEFENDANT determined would be needed to complete the tasks.

54) During the relevant time period, DEFENDANT willfully failed to pay PLAINTIFF and other class members the contracted hourly wage for hours spent downloading and uploading required and necessary information from the CROSSMARK website while off the clock.

55) DEFENDANT'S willful failure to pay PLAINTIFF and other class members their contractual wages for all hours worked, as required by California laws, violates the provision of the California Labor Code section 223, and is therefore unlawful.

Pursuant to California Labor Code section 223, PLAINTIFF and other class members are entitled to recover their unpaid hourly wages and all other statutory relief available.

56) Pursuant to California Labor Code section 2698 *et seq.*, PLAINTIFF and other

1 class members are entitled to recover all civil penalties owed to the Labor and workforce  
2 Development Agency.

3 **THIRD CAUSE OF ACTION**

4 **Violation of California Labor Code § 510**

5 57) PLAINTIFF incorporates by reference and re-alleges as if fully stated herein the  
6 material allegations set out in paragraphs 1 through 56.

7 58) California Labor Code section 1198 and the applicable Industrial Welfare  
8 Commission ("IWC") Wage Order provide that it is unlawful to employ persons without  
9 compensating them for overtime hours at a rate of pay either time-and-one-half or two-times that  
10 person's regular rate of pay, depending on the number of hours worked by the person on a daily or  
11 weekly basis.

12 59) Specifically, the applicable IWC Wage Order provides that DEFENDANT is and  
13 was required to pay PLAINTIFF and class members employed by DEFENDANT, and working  
14 more than eight (8) hours in a day or more than forty (40) hours in a workweek, at the rate of time-  
15 and-one-half for all hours worked in excess of eight (8) hours in a day or more than forty (40)  
16 hours in a workweek.

17 60) The applicable IWC Wage Order further provides that DEFENDANT is and was  
18 required to pay PLAINTIFF and class members employed by DEFENDANT, and working more  
19 than twelve (12) hours in a day, overtime compensation at a rate of two times their regular rate of  
20 pay.

21 61) California Labor Code section 510 codifies the right to overtime compensation at  
22 one-and-one-half times the regular hourly rate for hours worked in excess of eight (8) hours in a  
23 day or forty (40) hours in a week or for the first eight (8) hours worked on the seventh day of  
24 work, and to overtime compensation at twice the regular hourly rate for hours worked in excess of  
25 twelve (12) hours in a day or in excess of eight (8) hours in a day on the seventh day of work.

26 62) During the relevant time period, PLAINTIFF and class members consistently  
27 worked in excess of eight (8) hours in a day, in excess of twelve (12) hours in a day, and/or in  
28

1 excess of forty (40) hours in a week and should have been paid overtime compensation at either  
2 time-and-one-half or two-times that person's regular rate of pay.

3 63) DEFENDANT willfully failed to pay PLAINTIFF and other class members all  
4 overtime compensation owed.

5 64) In the instances when DEFENDANT did pay overtime it was due to a requested  
6 adjustment by PLAINTIFF and class members when the completed projected had taken longer  
7 than the time allotted. Approval was at the discretion of the supervisor, regardless of the fact the  
8 work has already been completed.

9 65) DEFENDANT'S willful failure to pay PLAINTIFF and class members' all  
10 overtime compensation, as required by California laws, violates the provisions of California Labor  
11 Code sections 510 and 1198, and is therefore unlawful.

12 66) Pursuant to California Labor Code section 1194, PLAINTIFF and class members  
13 are entitled to recover their unpaid overtime compensation, as well as interest, costs and attorneys'  
14 fees.

15 67) Pursuant to California Labor Code section 2698 *et seq.*, PLAINTIFF and other  
16 class members are entitled to recover all civil penalties owed to the Labor and Workforce  
17 Development Agency.

#### 18 **FOURTH CAUSE OF ACTION**

##### 19 **Violation of California Labor Code §§ 226.7(a) and 512(a)**

20 68) PLAINTIFF incorporates by reference and re-alleges as if fully stated herein the  
21 material allegations set out in paragraphs 1 through 67.

22 69) At all times herein set forth, the California IWC Order and California Labor Code  
23 §§ 226.7(a) and 512(a) were applicable to PLAINTIFF and the other class members employed by  
24 DEFENDANT.

25 70) At all times herein set forth, California Labor Code section 226.7(a) provided that  
26 no employer shall require an employee to work during any meal period mandated by an applicable  
27 order of the California IWC.

28

71) At all times herein set forth, California Labor Code section 512(a) provided that an employer may not require, cause or permit an employee to work for a period of more than five (5) hours per day without providing the employee with a meal period of not less than thirty (30) minutes, except that if the total work period per day of the employee is not more than six (6) hours, the meal period may be waived by mutual consent of both the employer and the employee.

72) At all times herein set forth, California Labor Code section 512(a) further provided that an employer may not require, cause or permit an employee to work for a period of more than ten (10) hours per day without providing the employee with a second meal period of not less than thirty (30) minutes, except that if the total of hours worked is no more than twelve (12) hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

73) During the relevant time period, PLAINTIFF and the other members of the class who were scheduled to work for a period of time no longer than six (6) hours, and who did not waive their legally-mandated meal periods by mutual consent, were required to work for periods longer than five (5) hours without a meal period of not less than thirty (30) minutes.

74) During the relevant time period, PLAINTIFF and the other class members who were scheduled to work for a period of time in excess of six (6) hours were required to work for periods longer than five (5) hours without receiving a meal period of not less than thirty (30) minutes.

75) During the relevant time period, PLAINTIFF and other members of the class who were required to work in excess of ten (10) hours but not longer than twelve (12) hours, and who did not waive their legally-mandated meal periods by mutual consent were required to work in excess of ten (10) hours without receiving a second meal period of not less than thirty (30) minutes.

76) During the relevant time period, PLAINTIFF and the other class members who were required to work for a period of time in excess of twelve (12) hours were required to work for periods longer than ten (10) hours without receiving a meal period of not less than thirty (30)

1 minutes.

2 77) During the relevant time period, DEFENDANT willfully required PLAINTIFF and  
3 other members of the class to work during meal periods. As evidenced in the fact that  
4 DEFENDANT had no system for recording when and if meal breaks were taken, nor offered times  
5 during the day when they could be.

6 78) DEFENDANT failed to compensate PLAINTIFF and members of the class for  
7 work performed during meal periods at their regular rate as required by California Labor Code  
8 section 226.7(b).

9 79) DEFENDANT'S conduct violates applicable IWC Wage Orders, and California  
10 Labor Code sections 226.7(a) and 512(a).

11 80) Pursuant to California Labor Code section 226.7(b), PLAINTIFF and other  
12 members of the class are entitled to recover from DEFENDANT all compensation for missed meal  
13 breaks that DEFENDANT failed to pay.

14 81) Pursuant to California Labor Code section 2698 *et seq.*, PLAINTIFF and other  
15 class members are entitled to recover all civil penalties owed to the Labor and Workforce  
16 Development Agency.

17 **FIFTH CAUSE OF ACTION**

18 **Violation of California Labor Code §§ 226.7(a)**

19 82) PLAINTIFF incorporates by reference and re-alleges as if fully stated herein the  
20 material allegations set out in paragraphs 1 through 81.

21 83) At all times herein set forth, the California IWC Order and California Labor Code  
22 section 226.7(a) was applicable to PLAINTIFF and other class members employed by  
23 DEFENDANT.

24 84) At all times herein set forth, California Labor Code section 226.7(a) provided that  
25 no employer shall require an employee to work during any rest period mandated by an applicable  
26 order of the California IWC.

27 85) During the relevant time period, DEFENDANT required PLAINTIFF and other  
28



1 members of the class to work in excess of four (4) hours without providing a ten (10) minute rest  
2 period.

3 86) During the relevant time period, DEFENDANT required PLAINTIFF and other  
4 members of the class to work an additional four (4) hours without providing a second ten (10)  
5 minute rest period.

6 87) During the relevant time period, DEFENDANT willfully required PLAINTIFF and  
7 other members of the class to work during rest breaks. As evidenced in the fact that  
8 DEFENDANT had no system for recording when and if rest breaks were taken, nor offered times  
9 during the day when they could be.

10 88) DEFENDANT failed to compensate PLAINTIFF and members of the class for  
11 work performed during rest periods.

12 89) DEFENDANT'S conduct violates applicable IWC Wage Orders, and California  
13 Labor Code section 226.7(a).

14 90) Pursuant to California Labor Code section 226.7(b), PLAINTIFF and other  
15 members of the class are entitled to recover from DEFENDANT one additional hour of pay at the  
16 employee's regular hourly rate of compensation for each workday that the rest period was not  
17 provided.

18 91) Pursuant to California Labor Code section 2698 *et seq.*, PLAINTIFF and other  
19 class members are entitled to recover all civil penalties owed to the Labor and Workforce  
20 Development Agency.

21 **SIXTH CAUSE OF ACTION**

22 **Violation of California Labor Code § 226(a)**

23 92) PLAINTIFF incorporates by reference and re-alleges as if fully stated herein the  
24 material allegations set out in paragraphs 1 through 91.

25 93) DEFENDANT has willfully and intentionally failed to provide employees with  
26 complete and accurate wage statements that include, among other things, the total actual number  
27 of hours worked by PLAINTIFF and the other class members, the rates of pay applicable during  
28

1 the pay period, and the inclusive dates of the pay period.

2 94) As a result of DEFENDANT'S violation of California Labor Code section 226(a),  
3 PLAINTIFF and the other class members have suffered injury and damage to their statutorily-  
4 protected rights.

5 95) Specifically, PLAINTIFF and the other class members have been injured by  
6 DEFENDANT'S intentional violation of California Labor Code section 226(a) because they were  
7 denied both their legal right to receive, and their protected interest in receiving, accurate, itemized  
8 wage statements under California Labor Code section 226(a).

9 96) PLAINTIFF and the other class members are entitled to recover from  
10 DEFENDANT the greater of their actual damages caused by DEFENDANT'S failure to comply  
11 with California Labor Code section 226(a), or an aggregate penalty not exceeding four thousand  
12 dollars per employee.

13 97) PLAINTIFF and the other class members are also entitled to an award of costs and  
14 reasonable attorneys' fees pursuant to California Labor Code section 226(e).

15 98) Pursuant to California Labor Code section 2698 *et seq.*, PLAINTIFF and other  
16 class members are entitled to recover all civil penalties owed to the Labor and Workforce  
17 Development Agency.

#### 18 SEVENTH CAUSE OF ACTION

##### 19 **Violation of California Labor Code §§ 2800 and 2802**

20 99) PLAINTIFF incorporates by reference and re-alleges as if fully stated herein the  
21 material allegation set out in paragraphs 1 through 98.

22 100) California Labor Code §§ 2800 and 2802 provide that an employer must reimburse  
23 employees for all necessary and actual expenditures incurred through the discharge of their duties.

24 101) DEFENDANT required PLAINTIFF and other class members, during off-duty  
25 hours, to print out daily reports, take digital photographs of completed tasks at job sites, and  
26 downloading and uploading required and necessary information from the CROSSMARK website.

27 102) PLAINTIFF and other class members incurred actual and necessary business-  
28

1 related expenses and costs, including but not limited to; the purchase of printing paper; digital  
2 cameras; mileage; and, internet service, in order to discharge their duties.

3 103) DEFENDANT failed to reimburse PLAINTIFF and class members for these  
4 expenses and costs, or did so improperly.

5 104) PLAINTIFF and other class members are entitled to recover from DEFENDANT  
6 their business-related expenses incurred during the discharge of their duties.

7 105) Pursuant to California Labor Code section 2698 *et seq.*, PLAINTIFF and other  
8 class members are entitled to recover all civil penalties owed to the Labor and Workforce  
9 Development Agency.

10 **EIGHTH CAUSE OF ACTION**

11 **Violation of California Labor Code §§ 201 and 202**

12 106) PLAINTIFF incorporates by reference and re-alleges as if fully stated herein the  
13 material allegations set out in paragraphs 1 through 105.

14 107) At all times herein set forth, California Labor Code sections 201 and 202 provided  
15 that if an employer discharges an employee, the wages earned and unpaid at the time of discharge  
16 are due and payable immediately, and that if an employee voluntarily leaves his or her  
17 employment, his or her wages shall become due and payable not later than seventy-two (72) hours  
18 thereafter, unless the employee has given seventy-two (72) hours previous notice of his or her  
19 intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

20 108) During the relevant time period, DEFENDANT willfully failed to pay PLAINTIFF  
21 and the other class members who are no longer employed by DEFENDANT their wages, earned  
22 and unpaid, either at the time of discharge, or within seventy-two (72) hours of their leaving  
23 DEFENDANT'S employ.

24 109) DEFENDANT'S failure to pay PLAINTIFF and those class members who are no  
25 longer employed by DEFENDANT their wages earned and unpaid at the time of discharge, or  
26 within seventy-two (72) hours of their leaving DEFENDANT'S employ, is in violation of  
27 California Labor Code sections 201 and 202.

28

1 110) California Labor Code section 203 provides that if an employer willfully fails to  
 2 pay wages owed, in accordance with sections 201 and 202, then the wages of the employee shall  
 3 continue as a penalty from the due date, and at the same rate until paid or until an action is  
 4 commenced; but the wages shall not continue for more than thirty (30) days.

5 111) PLAINTIFF and other class members are entitled to recover from DEFENDANT  
 6 the statutory penalty for each day they were not paid, at their regular hourly rate of pay, up to a  
 7 thirty (30) day maximum, pursuant to California Labor Code section 203.

8 112) Pursuant to California Labor Code section 2698 *et seq.*, PLAINTIFF and other  
 9 class members are entitled to recover all civil penalties owed to the Labor and Workforce  
 10 Development Agency.

#### 11 NINTH CAUSE OF ACTION

##### 12 **Violation of California Business & Professions Code §§ 17200, et seq.**

13 113) PLAINTIFF incorporates by reference and re-alleges as if fully stated herein the  
 14 material allegations set out in paragraphs 1 through 112.

15 114) DEFENDANT'S conduct, as alleged in this complaint, has been, and continues to  
 16 be, unfair, unlawful, and harmful to the PLAINTIFF, the other members of the class, and the  
 17 general public. PLAINTIFF seeks to enforce important rights affecting the public interest within  
 18 the meaning of Code of Civil Procedure section 1021.5.

19 115) DEFENDANT'S activities as alleged herein are violations of California law, and  
 20 constitute unlawful business acts and practices in violation of California Business & Professions  
 21 Code sections 17200, et seq.

22 116) A violation of California Business & Professions Code sections 17200, et seq. may  
 23 be predicated on the violation of any state or federal law. In the instant case, DEFENDANT'S  
 24 policy and practice of requiring employees, including PLAINTIFF and class members, to work  
 25 through their meal and rest breaks without paying them proper compensation violates California  
 26 Labor Code sections 226.7(a) and 512(a). Moreover, DEFENDANT'S policy and practice of  
 27 requiring work of the clock, failing to reimburse actual and necessary incurred costs and  
 28

1 intentionally underpaying the overtime and wages owed to PLAINTIFF and the other class  
2 members is unfair, unlawful, and harmful to PLAINTIFF, the other class members, and to the  
3 general public.

4 117) PLAINTIFF and the putative class members have been personally aggrieved by  
5 DEFENDANT'S unlawful business acts and practices alleged herein by the loss of money or  
6 property.

7 118) Pursuant to California Business & Professions Code sections 17200, et seq.,  
8 PLAINTIFF and the putative class members are entitled to restitution of the wages withheld and  
9 retained by DEFENDANT during a period that commences four years prior to the filing of this  
10 complaint; a permanent injunction requiring DEFENDANT to pay all outstanding wages due to  
11 class members; an award of attorneys' fees pursuant to California Code of Civil Procedure section  
12 1021.5 and other applicable laws; and an award of costs.

13 **REQUEST FOR JURY TRIAL**

14 PLAINTIFF requests a trial by jury.

15  
16 **PRAYER FOR RELIEF**

17 PLAINTIFF prays for relief and judgment against DEFENDANT, as follows:

18 **Class Certification**

- 19 1. That this action be certified as a class action;  
20 2. That PLAINTIFF be appointed as representative of the class; and,  
21 3. That counsel for PLAINTIFF be appointed as class Counsel.

22 **As to the First Cause of Action**

- 23 1. That the Court declare, adjudge and decree that DEFENDANT violated California  
24 Labor Code section 1194 by wilfully failing to pay all applicable minimum wages due to  
25 PLAINTIFF and class members;  
26 2. For general unpaid minimum wages and such general and special damages as may  
27 be appropriate;  
28

3. For pre-judgment interest on any unpaid minimum wage compensation from the date such amounts were due;

4. For liquidated damages in an amount equal to the wages unlawfully unpaid with interest thereon pursuant to California Labor Code § 1194.2;

5. For reasonable attorney's fees and for costs of suit incurred herein pursuant to California Labor Code § 1194(a);

6. For any and all civil penalties owed to the Labor and Workforce Development Agency as pursuant to California Labor Code section 2698 *et seq.*; and,

7. For such other and further relief as the Court may deem equitable and appropriate.

As to the Second Cause of Action

1. For all actual, consequential, and incidental losses and damages, according to proof;

2. For general unpaid wages pursuant to California Labor Code § 223 and such general and special damages as may be appropriate;

3. For pre-judgment interest on any unpaid wages;

4. For any and all other statutory relief available; and,

5. For any civil penalties owed to the Labor and Workforce Development Agency as pursuant to California Labor Code section 2698 *et seq.*

6. For such other and further relief as the Court may deem equitable and appropriate.

As to the Third Cause of Action

1. For all actual, consequential, and incidental losses and damages, according to proof;

2. For all overtime wages pursuant to California Labor Code sections 510 and 1198 and applicable IWC Wage Orders;

3. For general unpaid wages at overtime wage rates and such general and special damages as may be appropriate;

4. For pre-judgment interest on any unpaid overtime compensation commencing from



1 the date such amounts were due;

2 5. For reasonable attorneys' fees and for costs of suit incurred herein pursuant to  
3 California Labor Code section 1194(a);

4 6. For any and all civil penalties owed to the Labor and Workforce Development  
5 Agency as pursuant to California Labor Code section 2698 *et seq.*; and,

6 7. For such other and further relief as the Court may deem equitable and appropriate.

7 As to the Fourth Cause of Action

8 1. For all actual, consequential, and incidental losses and damages, according to  
9 proof;

10 2. For wages pursuant to California Labor Code section 226.7(b);

11 3. For reasonable attorneys' fees and costs of suit incurred herein;

12 4. For any and all civil penalties owed to the Labor and Workforce Development  
13 Agency as pursuant to California Labor Code section 2698 *et seq.*; and,

14 5. For such other and further relief as the Court may deem appropriate.

15 As to the Fifth Cause of Action

16 1. For all actual, consequential and incidental losses and damages, according to proof;

17 2. For wages pursuant to California Labor Code section 226.7(b);

18 3. For reasonable attorneys' fees and costs of suit incurred herein;

19 4. For any and all civil penalties owed to the Labor and Workforce Development  
20 Agency as pursuant to California Labor Code section 2698 *et seq.*; and,

21 5. For such other and further relief as the Court may deem appropriate.

22 As to the Sixth Cause of Action

23 1. For all actual, consequential and incidental losses and damages, according to proof;

24 2. For statutory penalties pursuant to California Labor Code section 226(e);

25 3. For reasonable attorneys' fees and costs of suit incurred herein pursuant to  
26 California Labor Code section 226(e);

27 4. For any and all civil penalties owed to the Labor and Workforce Development  
28

1 Agency as pursuant to California Labor Code section 2698 *et seq.*; and,

2 5. For such other and further relief as the Court may deem equitable and appropriate.

3 As to the Seventh Cause of Action

4 1. For all actual, consequential, and incidental losses and damages, according to  
5 proof;

6 2. For the reimbursement of out of pocket expenses incurred during the discharge of  
7 duties pursuant to California Labor Code Sections 2800 and 2802.

8 3. For reasonable attorneys' fees and costs of suit incurred herein;

9 4. For any civil penalties owed to the Labor and Workforce Development Agency as  
10 pursuant to California Labor Code section 2698 *et seq.*; and,

11 5. For such other and further relief as the Court may deem appropriate.

12 As to the Eighth Cause of Action

13 1. For all penalties pursuant to California Labor Code section 203;

14 2. For reasonable attorneys' fees and for costs of suit incurred herein; and

15 3. For such other and further relief as the Court may deem equitable and appropriate.

16 4. For any and all civil penalties owed to the Labor and Workforce Development

17 Agency as pursuant to California Labor Code section 2698 *et seq.*; and,

18 As to the Ninth Cause of Action

19 1. For restitution of unpaid wages to all class members and prejudgment interest from  
20 the day such amounts were due and payable;

21 2. For the appointment of a receiver to receive, manage and distribute any and all  
22 funds disgorged from DEFENDANT and determined to have been wrongfully acquired by  
23 DEFENDANT as a result of violations of California Business & Professions Code sections 17200  
24 *et seq.*;

25 3. For reasonable attorneys' fees and costs of suit incurred herein pursuant to  
26 California Code of Civil Procedure section 1021.5;

27 4. For injunctive relief to ensure compliance with this section, pursuant to California  
28

1 Business & Professions Code sections 17200, et seq.; and,

2 5. For such other and further relief as the Court may deem equitable and appropriate.

3  
4 DATED: October 8, 2013

Respectfully submitted

5 KAWAHITO SHRAGA & WESTRICK LLP

6  
7 By  

8 SHAWN C. WESTRICK  
9 TIMOTHY P. HENNESSY  
Attorneys for Plaintiff/Class Members

CM-010

FOR COURT USE ONLY

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State and number, and address):

Shawn C. Westrick (SBN 235313)

Timothy P. Hennessy (SBN 286317)

Kawahito Shraga &amp; Westrick LLP

1990 South Bundy Drive, Suite 280, Los Angeles, CA 90025

TELEPHONE NO.: (310) 746-5300

FAX NO.: (310) 593-2520

ATTORNEY FOR (Name): Gayle Smith

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Los Angeles

STREET ADDRESS: 111 N. Hill Street

MAILING ADDRESS: 111 N. Hill Street

CITY AND ZIP CODE: Los Angeles, CA 90012

BRANCH NAME: Central

CASE NAME:

Smith v. Crossmark, Inc.

John A. Clarke, Executive Officer/Clerk  
By Amber Hayes, Deputy

## CIVIL CASE COVER SHEET

- ☒ **Unlimited** (Amount demanded exceeds \$25,000) ☐ **Limited** (Amount demanded is \$25,000 or less)

## Complex Case Designation

- ☐ **Counter** ☐ **Joinder**

Filed with first appearance by defendant  
(Cal. Rules of Court, rule 3.402)

CASE NUMBER:

JUDGE:

DEPT:

CCY 092013

CONFORMED COPY  
ORIGINAL FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

BC523981

Items 1-6 below must be completed (see instructions on page 2).

## 1. Check one box below for the case type that best describes this case:

## Auto Tort

- ☐ Auto (22)  
☐ Uninsured motorist (46)

## Other PIPD/WD (Personal Injury/Property Damage/Wrongful Death) Tort

- ☐ Asbestos (04)  
☐ Product liability (24)  
☐ Medical malpractice (45)  
☐ Other PIPD/WD (23)

## Non-PIP/WD (Other) Tort

- ☐ Business tort/unfair business practice (07)  
☐ Civil rights (08)  
☐ Defamation (13)  
☐ Fraud (16)  
☐ Intellectual property (19)  
☐ Professional negligence (25)  
☐ Other non-PIP/WD tort (35)

## Employment

- ☐ Wrongful termination (36)  
☒ Other employment (15)

## Contract

- ☐ Breach of contract/warranty (06)  
☐ Rule 3.740 collections (09)  
☐ Other collections (09)  
☐ Insurance coverage (18)  
☐ Other contract (37)

## Real Property

- ☐ Eminent domain/inverse condemnation (14)  
☐ Wrongful eviction (33)  
☐ Other real property (26)

## Unlawful Detainer

- ☐ Commercial (31)  
☐ Residential (32)  
☐ Drugs (38)

## Judicial Review

- ☐ Asset forfeiture (05)  
☐ Petition re: arbitration award (11)  
☐ Writ of mandate (02)  
☐ Other judicial review (39)

Provisionally Complex Civil Litigation  
(Cal. Rules of Court, rules 3.400-3.403)

- ☐ Antitrust/Trade regulation (03)  
☐ Construction defect (10)  
☐ Mass tort (40)  
☐ Securities litigation (28)  
☐ Environmental/Toxic tort (30)  
☐ Insurance coverage claims arising from the above listed provisionally complex case types (41)

## Enforcement of Judgment

- ☐ Enforcement of judgment (20)

## Miscellaneous Civil Complaint

- ☐ RICO (27)  
☐ Other complaint (not specified above) (42)

## Miscellaneous Civil Petition

- ☐ Partnership and corporate governance (21)  
☐ Other petition (not specified above) (43)

2. This case ☒ is ☐ is not complex under rule 3.400 of the California Rules of Court. If the case is complex, mark the factors requiring exceptional judicial management:

- a. ☐ Large number of separately represented parties d. ☐ Large number of witnesses  
b. ☐ Extensive motion practice raising difficult or novel issues that will be time-consuming to resolve e. ☐ Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court  
c. ☒ Substantial amount of documentary evidence f. ☐ Substantial postjudgment judicial supervision

3. Remedies sought (check all that apply): a. ☒ monetary b. ☒ nonmonetary; declaratory or injunctive relief c. ☒ punitive

## 4. Number of causes of action (specify):

5. This case ☒ is ☐ is not a class action suit.

## 6. If there are any known related cases, file and serve a notice of related case. (You may use form CM-015.)

Date: October 9, 2013

Timothy P. Hennessy

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTY OR ATTORNEY FOR PARTY)

## NOTICE

- Plaintiff must file this cover sheet with the first paper filed in the action or proceeding (except small claims cases or cases filed under the Probate Code, Family Code, or Welfare and Institutions Code). (Cal. Rules of Court, rule 3.220.) Failure to file may result in sanctions.
- File this cover sheet in addition to any cover sheet required by local court rule.
- If this case is complex under rule 3.400 et seq. of the California Rules of Court, you must serve a copy of this cover sheet on all other parties to the action or proceeding.
- Unless this is a collections case under rule 3.740 or a complex case, this cover sheet will be used for statistical purposes only.

Page 1 of 2

SHORT TITLE:

Smith v. Crossmark, Inc.

CASE NUMBER

BC523981

**CIVIL CASE COVER SHEET ADDENDUM AND  
STATEMENT OF LOCATION  
(CERTIFICATE OF GROUNDS FOR ASSIGNMENT TO COURTHOUSE LOCATION)**

This form is required pursuant to Local Rule 2.0 in all new civil case filings in the Los Angeles Superior Court.

Item I. Check the types of hearing and fill in the estimated length of hearing expected for this case:

JURY TRIAL? ☒ YES CLASS ACTION? ☒ YES LIMITED CASE? ☐ YES TIME ESTIMATED FOR TRIAL 5 ☐ HOURS/ ☒ DAYS

Item II. Indicate the correct district and courthouse location (4 steps – If you checked "Limited Case", skip to Item III, Pg. 4):

**Step 1:** After first completing the Civil Case Cover Sheet form, find the main Civil Case Cover Sheet heading for your case in the left margin below, and, to the right in Column A, the Civil Case Cover Sheet case type you selected.

**Step 2:** Check one Superior Court type of action in Column B below which best describes the nature of this case.

**Step 3:** In Column C, circle the reason for the court location choice that applies to the type of action you have checked. For any exception to the court location, see Local Rule 2.0.

**Applicable Reasons for Choosing Courthouse Location (see Column C below)**

1. Class actions must be filed in the Stanley Mosk Courthouse, central district.
2. May be filed in central (other county, or no bodily injury/property damage).
3. Location where cause of action arose.
4. Location where bodily injury, death or damage occurred.
5. Location where performance required or defendant resides.
6. Location of property or permanently garaged vehicle.
7. Location where petitioner resides.
8. Location wherein defendant/respondent functions wholly.
9. Location where one or more of the parties reside.
10. Location of Labor Commissioner Office

**Step 4:** Fill in the information requested on page 4 in Item III; complete Item IV. Sign the declaration.

	A Civil Case Cover Sheet Category No.	B Type of Action (Check only one)	C Applicable Reasons (See Step 3 Above)
Auto Tort	Auto (22)	<input type="checkbox"/> A7100 Motor Vehicle - Personal Injury/Property Damage/Wrongful Death	1., 2., 4.
	Uninsured Motorist (46)	<input type="checkbox"/> A7110 Personal Injury/Property Damage/Wrongful Death – Uninsured Motorist	1., 2., 4.
Other Personal Injury/Property Damage/Wrongful Death Tort	Asbestos (04)	<input type="checkbox"/> A6070 Asbestos Property Damage <input type="checkbox"/> A7221 Asbestos - Personal Injury/Wrongful Death	2. 2.
	Product Liability (24)	<input type="checkbox"/> A7260 Product Liability (not asbestos or toxic/environmental)	1., 2., 3., 4., 8.
	Medical Malpractice (45)	<input type="checkbox"/> A7210 Medical Malpractice - Physicians & Surgeons <input type="checkbox"/> A7240 Other Professional Health Care Malpractice	1., 4. 1., 4.
	Other Personal Injury Property Damage Wrongful Death (23)	<input type="checkbox"/> A7250 Premises Liability (e.g., slip and fall)	1., 4.
		<input type="checkbox"/> A7230 Intentional Bodily Injury/Property Damage/Wrongful Death (e.g., assault, vandalism, etc.)	1., 4.
		<input type="checkbox"/> A7270 Intentional Infliction of Emotional Distress	1., 3.
		<input type="checkbox"/> A7220 Other Personal Injury/Property Damage/Wrongful Death	1., 4.



SHORT TITLE: <b>Smith v. Crossmark, Inc.</b>	CASE NUMBER:
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	A Civil Case Cover Sheet Category No.	B Type of Action (check only one)	C Applicable Reasons (See Step 3 Above)
Non-Personal Injury/Property Damage/Wrongful Death Tort	Business Tort (07)	<input type="checkbox"/> A6029 Other Commercial/Business Tort (not fraud/breach of contract)	1., 3.
	Civil Rights (08)	<input type="checkbox"/> A6005 Civil Rights/Discrimination	1., 2., 3.
	Defamation (13)	<input type="checkbox"/> A6010 Defamation (slander/libel)	1., 2., 3.
	Fraud (16)	<input type="checkbox"/> A6013 Fraud (no contract)	1., 2., 3.
	Professional Negligence (25)	<input type="checkbox"/> A6017 Legal Malpractice <input type="checkbox"/> A6050 Other Professional Malpractice (not medical or legal)	1., 2., 3. 1., 2., 3.
	Other (35)	<input type="checkbox"/> A6025 Other Non-Personal Injury/Property Damage tort	2., 3.
Employment	Wrongful Termination (38)	<input type="checkbox"/> A6037 Wrongful Termination	1., 2., 3.
	Other Employment (15)	<input checked="" type="checkbox"/> A6024 Other Employment Complaint Case <input type="checkbox"/> A6109 Labor Commissioner Appeals	1., 2., 3. 10.
Contract	Breach of Contract/ Warranty (06) (not Insurance)	<input type="checkbox"/> A6004 Breach of Rental/Lease Contract (not unlawful detainer or wrongful eviction) <input type="checkbox"/> A6008 Contract/Warranty Breach -Seller Plaintiff (no fraud/negligence) <input type="checkbox"/> A6019 Negligent Breach of Contract/Warranty (no fraud) <input type="checkbox"/> A6028 Other Breach of Contract/Warranty (not fraud or negligence)	2., 5. 2., 5. 1., 2., 5. 1., 2., 5.
	Collections (09)	<input type="checkbox"/> A6002 Collections Case-Seller Plaintiff <input type="checkbox"/> A6012 Other Promissory Note/Collections Case	2., 5., 6. 2., 5.
	Insurance Coverage (18)	<input type="checkbox"/> A6015 Insurance Coverage (not complex)	1., 2., 5., 6.
	Other Contract (37)	<input type="checkbox"/> A6009 Contractual Fraud <input type="checkbox"/> A6031 Tortious Interference <input type="checkbox"/> A6027 Other Contract Dispute(not breach/insurance/fraud/negligence)	1., 2., 3., 5. 1., 2., 3., 5. 1., 2., 3., 6.
	Eminent Domain/Inverse Condemnation (14)	<input type="checkbox"/> A7300 Eminent Domain/Condemnation      Number of parcels _____	2.
	Wrongful Eviction (33)	<input type="checkbox"/> A6023 Wrongful Eviction Case	2., 6.
Real Property	Other Real Property (26)	<input type="checkbox"/> A6018 Mortgage Foreclosure <input type="checkbox"/> A6032 Quiet Title <input type="checkbox"/> A6060 Other Real Property (not eminent domain, landlord/tenant, foreclosure)	2., 6. 2., 6. 2., 6.
	Unlawful Detainer-Commercial (31)	<input type="checkbox"/> A6021 Unlawful Detainer-Commercial (not drugs or wrongful eviction)	2., 6.
	Unlawful Detainer-Residential (32)	<input type="checkbox"/> A6020 Unlawful Detainer-Residential (not drugs or wrongful eviction)	2., 6.
Unlawful Detainer	Unlawful Detainer- Post-Foreclosure (34)	<input type="checkbox"/> A6020F Unlawful Detainer-Post-Foreclosure	2., 6.
	Unlawful Detainer-Drugs (38)	<input type="checkbox"/> A6022 Unlawful Detainer-Drugs	2., 6.



SHORT TITLE: <b>Smith v. Crossmark, Inc.</b>	CASE NUMBER:
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	A Civil Case Cover Sheet Category/No.	B Type of Action (Check only one)	C Applicable Reasons (See Step 3 Above)
Judicial Review	Asset Forfeiture (05)	<input type="checkbox"/> A6108 Asset Forfeiture Case	2., 8.
	Petition re Arbitration (11)	<input type="checkbox"/> A6115 Petition to Compel/Confirm/Vacate Arbitration	2., 5.
	Writ of Mandate (02)	<input type="checkbox"/> A6151 Writ - Administrative Mandamus <input type="checkbox"/> A6152 Writ - Mandamus on Limited Court Case Matter <input type="checkbox"/> A6153 Writ - Other Limited Court Case Review	2., 8. 2. 2.
	Other Judicial Review (39)	<input type="checkbox"/> A6150 Other Writ /Judicial Review	2., 8.
Provisionally Complex Litigation	Antitrust/Trade Regulation (03)	<input type="checkbox"/> A6003 Antitrust/Trade Regulation	1., 2., 8.
	Construction Defect (10)	<input type="checkbox"/> A6007 Construction Defect	1., 2., 3.
	Claims Involving Mass Tort (40)	<input type="checkbox"/> A6006 Claims Involving Mass Tort	1., 2., 8.
	Securities Litigation (28)	<input type="checkbox"/> A6035 Securities Litigation Case	1., 2., 8.
	Toxic Tort Environmental (30)	<input type="checkbox"/> A6036 Toxic Tort/Environmental	1., 2., 3., 8.
	Insurance Coverage Claims from Complex Case (41)	<input type="checkbox"/> A6014 Insurance Coverage/Subrogation (complex case only)	1., 2., 5., 8.
Enforcement of Judgment	Enforcement of Judgment (20)	<input type="checkbox"/> A6141 Sister State Judgment	2., 9.
		<input type="checkbox"/> A6160 Abstract of Judgment	2., 8.
		<input type="checkbox"/> A6107 Confession of Judgment (non-domestic relations)	2., 9.
		<input type="checkbox"/> A6140 Administrative Agency Award (not unpaid taxes)	2., 8.
		<input type="checkbox"/> A6114 Petition/Certificate for Entry of Judgment on Unpaid Tax	2., 8.
		<input type="checkbox"/> A6112 Other Enforcement of Judgment Case	2., 8., 9.
Miscellaneous Civil Complaints	RICO (27)	<input type="checkbox"/> A6033 Racketeering (RICO) Case	1., 2., 8.
	Other Complaints (Not Specified Above) (42)	<input type="checkbox"/> A6030 Declaratory Relief Only	1., 2., 8.
		<input type="checkbox"/> A6040 Injunctive Relief Only (not domestic/harassment)	2., 8.
		<input type="checkbox"/> A6011 Other Commercial Complaint Case (non-tort/non-complex)	1., 2., 8.
<input type="checkbox"/> A6000 Other Civil Complaint (non-tort/non-complex)	1., 2., 8.		
Miscellaneous Civil Petitions	Partnership Corporation Governance (21)	<input type="checkbox"/> A6113 Partnership and Corporate Governance Case	2., 8.
	Other Petitions (Not Specified Above) (43)	<input type="checkbox"/> A6121 Civil Harassment	2., 3., 9.
<input type="checkbox"/> A6123 Workplace Harassment		2., 3., 9.	
<input type="checkbox"/> A6124 Elder/Dependent Adult Abuse Case		2., 3., 9.	
<input type="checkbox"/> A6190 Election Contest		2.	
<input type="checkbox"/> A6110 Petition for Change of Name		2., 7.	
<input type="checkbox"/> A6170 Petition for Relief from Late Claim Law		2., 3., 4., 8.	
<input type="checkbox"/> A6100 Other Civil Petition		2., 9.	

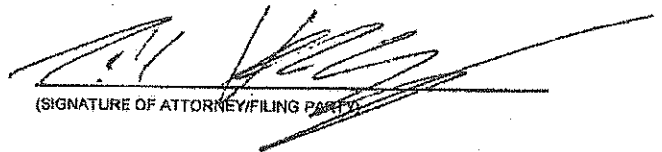
SHORT TITLE: Smith v. Crossmark, Inc.	CASE NUMBER
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**Item III. Statement of Location:** Enter the address of the accident, party's residence or place of business, performance, or other circumstance indicated in Item II., Step 3 on Page 1, as the proper reason for filing in the court location you selected.

<b>REASON:</b> Check the appropriate boxes for the numbers shown under Column C for the type of action that you have selected for this case.  <input checked="" type="checkbox"/> 1. <input type="checkbox"/> 2. <input type="checkbox"/> 3. <input type="checkbox"/> 4. <input type="checkbox"/> 5. <input type="checkbox"/> 6. <input type="checkbox"/> 7. <input type="checkbox"/> 8. <input type="checkbox"/> 9. <input type="checkbox"/> 10.		<b>ADDRESS:</b> 4554 North Banner Drive, #4
<b>CITY:</b> Long Beach	<b>STATE:</b> CA	<b>ZIP CODE:</b> 90807

**Item IV. Declaration of Assignment:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that the above-entitled matter is properly filed for assignment to the Stanley Mosk courthouse in the Central District of the Superior Court of California, County of Los Angeles [Code Civ. Proc., § 392 et seq., and Local Rule 2.0, subds. (b), (c) and (d)].

Dated: October 9, 2013

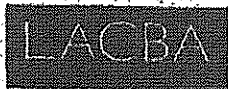
  
(SIGNATURE OF ATTORNEY/FILING PARTY)

**PLEASE HAVE THE FOLLOWING ITEMS COMPLETED AND READY TO BE FILED IN ORDER TO PROPERLY COMMENCE YOUR NEW COURT CASE:**

1. Original Complaint or Petition.
2. If filing a Complaint, a completed Summons form for issuance by the Clerk.
3. Civil Case Cover Sheet, Judicial Council form CM-010.
4. Civil Case Cover Sheet Addendum and Statement of Location form, LACIV 109, LASC Approved 03-04 (Rev. 03/11).
5. Payment in full of the filing fee, unless fees have been waived.
6. A signed order appointing the Guardian ad Litem, Judicial Council form CIV-010, if the plaintiff or petitioner is a minor under 18 years of age will be required by Court in order to issue a summons.
7. Additional copies of documents to be conformed by the Clerk. Copies of the cover sheet and this addendum must be served along with the summons and complaint, or other initiating pleading in the case.

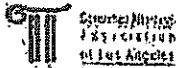


Superior Court of California  
County of Los Angeles

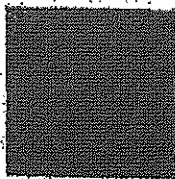


Los Angeles County  
Bar Association  
Litigation Section

Los Angeles County  
Bar Association Labor and  
Employment Law Section



Consumer Attorneys  
Association of Los Angeles



Southern California  
Defense Counsel



Association of  
Business Trial Lawyers



California Employment  
Lawyers Association

## VOLUNTARY EFFICIENT LITIGATION STIPULATIONS

The Early Organizational Meeting Stipulation, Discovery Resolution Stipulation, and Motions in Limine Stipulation are voluntary stipulations entered into by the parties. The parties may enter into one, two, or all three of the stipulations; however, they may not alter the stipulations as written, because the Court wants to ensure uniformity of application. These stipulations are meant to encourage cooperation between the parties and to assist in resolving issues in a manner that promotes economic case resolution and judicial efficiency.

*The following organizations endorse the goal of promoting efficiency in litigation and ask that counsel consider using these stipulations as a voluntary way to promote communications and procedures among counsel and with the court to fairly resolve issues in their cases.*

◆ Los Angeles County Bar Association Litigation Section ◆

◆ Los Angeles County Bar Association  
Labor and Employment Law Section ◆

◆ Consumer Attorneys Association of Los Angeles ◆

◆ Southern California Defense Counsel ◆

◆ Association of Business Trial Lawyers ◆

◆ California Employment Lawyers Association ◆

NAME AND ADDRESS OF ATTORNEY OR PARTY WITHOUT ATTORNEY:		STATE BAR NUMBER	Reserved for Clerk's File Stamp
TELEPHONE NO.:		FAX NO. (Optional):	
E-MAIL ADDRESS (Optional):			
ATTORNEY FOR (Name):			
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES</b>			
COURTHOUSE ADDRESS:			
PLAINTIFF:			
DEFENDANT:			
<b>STIPULATION – EARLY ORGANIZATIONAL MEETING</b>			CASE NUMBER

This stipulation is intended to encourage cooperation among the parties at an early stage in the litigation and to assist the parties in efficient case resolution.

The parties agree that:

1. The parties commit to conduct an initial conference (in-person or via teleconference or via videoconference) within 15 days from the date this stipulation is signed, to discuss and consider whether there can be agreement on the following:
  - a. Are motions to challenge the pleadings necessary? If the issue can be resolved by amendment as of right, or if the Court would allow leave to amend, could an amended complaint resolve most or all of the issues a demurrer might otherwise raise? If so, the parties agree to work through pleading issues so that a demurrer need only raise issues they cannot resolve. Is the issue that the defendant seeks to raise amenable to resolution on demurrer, or would some other type of motion be preferable? Could a voluntary targeted exchange of documents or information by any party cure an uncertainty in the pleadings?
  - b. Initial mutual exchanges of documents at the "core" of the litigation. (For example, in an employment case, the employment records, personnel file and documents relating to the conduct in question could be considered "core." In a personal injury case, an incident or police report, medical records, and repair or maintenance records could be considered "core.");
  - c. Exchange of names and contact information of witnesses;
  - d. Any insurance agreement that may be available to satisfy part or all of a judgment, or to indemnify or reimburse for payments made to satisfy a judgment;
  - e. Exchange of any other information that might be helpful to facilitate understanding, handling, or resolution of the case in a manner that preserves objections or privileges by agreement;
  - f. Controlling issues of law that, if resolved early, will promote efficiency and economy in other phases of the case. Also, when and how such issues can be presented to the Court;
  - g. Whether or when the case should be scheduled with a settlement officer, what discovery or court ruling on legal issues is reasonably required to make settlement discussions meaningful, and whether the parties wish to use a sitting judge or a private mediator or other options as

SHORT TITLE	CASE NUMBER
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discussed in the "Alternative Dispute Resolution (ADR) Information Package" served with the complaint;

- h. Computation of damages, including documents not privileged or protected from disclosure, on which such computation is based;
  - i. Whether the case is suitable for the Expedited Jury Trial procedures (see information at [www.lasuperiorcourt.org](http://www.lasuperiorcourt.org) under "Civil" and then under "General Information").
2. The time for a defending party to respond to a complaint or cross-complaint will be extended to \_\_\_\_\_ (INSERT DATE) for the complaint, and \_\_\_\_\_ (INSERT DATE) for the cross-complaint, which is comprised of the 30 days to respond under Government Code § 68616(b), and the 30 days permitted by Code of Civil Procedure section 1054(a), good cause having been found by the Civil Supervising Judge due to the case management benefits provided by this Stipulation.
  3. The parties will prepare a joint report titled "Joint Status Report Pursuant to Initial Conference and Early Organizational Meeting Stipulation, and if desired, a proposed order summarizing results of their meet and confer and advising the Court of any way it may assist the parties' efficient conduct or resolution of the case. The parties shall attach the Joint Status Report to the Case Management Conference statement, and file the documents when the CMC statement is due.
  4. References to "days" mean calendar days, unless otherwise noted. If the date for performing any act pursuant to this stipulation falls on a Saturday, Sunday or Court holiday, then the time for performing that act shall be extended to the next Court day

The following parties stipulate:

Date:

\_\_\_\_\_  
(TYPE OR PRINT NAME)

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\_\_\_\_\_  
(ATTORNEY FOR PLAINTIFF)

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\_\_\_\_\_  
(ATTORNEY FOR DEFENDANT)

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(ATTORNEY FOR DEFENDANT)

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(ATTORNEY FOR DEFENDANT)

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(ATTORNEY FOR \_\_\_\_\_)

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\_\_\_\_\_  
(ATTORNEY FOR \_\_\_\_\_)

>

\_\_\_\_\_  
(ATTORNEY FOR \_\_\_\_\_)



NAME AND ADDRESS OF ATTORNEY OR PARTY WITHOUT ATTORNEY:		STATE BAR NUMBER	Reserved for Clerk's File Stamp
TELEPHONE NO.:		FAX NO. (Optional):	
E-MAIL ADDRESS (Optional):			
ATTORNEY FOR (Name):			
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES</b>			
COURTHOUSE ADDRESS:			
PLAINTIFF:			
DEFENDANT:			
<b>STIPULATION – DISCOVERY RESOLUTION</b>			CASE NUMBER:

This stipulation is intended to provide a fast and informal resolution of discovery issues through limited paperwork and an informal conference with the Court to aid in the resolution of the issues.

The parties agree that:

1. Prior to the discovery cut-off in this action, no discovery motion shall be filed or heard unless the moving party first makes a written request for an Informal Discovery Conference pursuant to the terms of this stipulation.
2. At the Informal Discovery Conference the Court will consider the dispute presented by parties and determine whether it can be resolved informally. Nothing set forth herein will preclude a party from making a record at the conclusion of an Informal Discovery Conference, either orally or in writing.
3. Following a reasonable and good faith attempt at an informal resolution of each issue to be presented, a party may request an Informal Discovery Conference pursuant to the following procedures:
  - a. The party requesting the Informal Discovery Conference will:
    - i. File a Request for Informal Discovery Conference with the clerk's office on the approved form (copy attached) and deliver a courtesy, conformed copy to the assigned department;
    - ii. Include a brief summary of the dispute and specify the relief requested; and
    - iii. Serve the opposing party pursuant to any authorized or agreed method of service that ensures that the opposing party receives the Request for Informal Discovery Conference no later than the next court day following the filing.
  - b. Any Answer to a Request for Informal Discovery Conference must:
    - i. Also be filed on the approved form (copy attached);
    - ii. Include a brief summary of why the requested relief should be denied;



SHORT TITLE:	CASE NUMBER:
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- iii. Be filed within two (2) court days of receipt of the Request; and
  - iv. Be served on the opposing party pursuant to any authorized or agreed upon method of service that ensures that the opposing party receives the Answer no later than the next court day following the filing.
- c. No other pleadings, including but not limited to exhibits, declarations, or attachments, will be accepted.
  - d. If the Court has not granted or denied the Request for Informal Discovery Conference within ten (10) days following the filing of the Request, then it shall be deemed to have been denied. If the Court acts on the Request, the parties will be notified whether the Request for Informal Discovery Conference has been granted or denied and, if granted, the date and time of the Informal Discovery Conference, which must be within twenty (20) days of the filing of the Request for Informal Discovery Conference.
  - e. If the conference is not held within twenty (20) days of the filing of the Request for Informal Discovery Conference, unless extended by agreement of the parties and the Court, then the Request for the Informal Discovery Conference shall be deemed to have been denied at that time.
- 4. If (a) the Court has denied a conference or (b) one of the time deadlines above has expired without the Court having acted or (c) the Informal Discovery Conference is concluded without resolving the dispute, then a party may file a discovery motion to address unresolved issues.
  - 5. The parties hereby further agree that the time for making a motion to compel or other discovery motion is tolled from the date of filing of the Request for Informal Discovery Conference until (a) the request is denied or deemed denied or (b) twenty (20) days after the filing of the Request for Informal Discovery Conference, whichever is earlier, unless extended by Order of the Court.
- It is the understanding and intent of the parties that this stipulation shall, for each discovery dispute to which it applies, constitute a writing memorializing a "specific later date to which the propounding [or demanding or requesting] party and the responding party have agreed in writing," within the meaning of Code Civil Procedure sections 2030.300(c), 2031.320(c), and 2033.290(c).
- 6. Nothing herein will preclude any party from applying *ex parte* for appropriate relief, including an order shortening time for a motion to be heard concerning discovery.
  - 7. Any party may terminate this stipulation by giving twenty-one (21) days notice of intent to terminate the stipulation.
  - 8. References to "days" mean calendar days, unless otherwise noted. If the date for performing any act pursuant to this stipulation falls on a Saturday, Sunday or Court holiday, then the time for performing that act shall be extended to the next Court day.

SHORT TITLE:	CASE NUMBER:
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The following parties stipulate:

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Date:

(TYPE OR PRINT NAME)

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(ATTORNEY FOR PLAINTIFF)

➤

(ATTORNEY FOR DEFENDANT)

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(ATTORNEY FOR DEFENDANT)

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(ATTORNEY FOR DEFENDANT)

➤

(ATTORNEY FOR \_\_\_\_\_)

➤

(ATTORNEY FOR \_\_\_\_\_)

➤

(ATTORNEY FOR \_\_\_\_\_)

NAME AND ADDRESS OF ATTORNEY OR PARTY WITHOUT ATTORNEY:		STATE BAR NUMBER	Reserved for Clerk's File Stamp
TELEPHONE NO.: E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name):		FAX NO. (Optional):	
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES</b>			
COURTHOUSE ADDRESS:			
PLAINTIFF:			
DEFENDANT:			CASE NUMBER:
<b>INFORMAL DISCOVERY CONFERENCE</b> (pursuant to the Discovery Resolution Stipulation of the parties)			

- This document relates to:
  - ☐ Request for Informal Discovery Conference
  - ☐ Answer to Request for Informal Discovery Conference
- Deadline for Court to decide on Request: \_\_\_\_\_ (insert date 10 calendar days following filing of the Request).
- Deadline for Court to hold Informal Discovery Conference: \_\_\_\_\_ (insert date 20 calendar days following filing of the Request).
- For a Request for Informal Discovery Conference, briefly describe the nature of the discovery dispute, including the facts and legal arguments at issue. For an Answer to Request for Informal Discovery Conference, briefly describe why the Court should deny the requested discovery, including the facts and legal arguments at issue.

NAME AND ADDRESS OF ATTORNEY OR PARTY WITHOUT ATTORNEY:		STATE BAR NUMBER	Reserved for Case's File Stamp
TELEPHONE NO.:		FAX NO. (Optional):	
E-MAIL ADDRESS (Optional):			
ATTORNEY FOR (Name):			
<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES</b>			
COURTHOUSE ADDRESS:			
PLAINTIFF:			
DEPENDANT:			
<b>STIPULATION AND ORDER – MOTIONS IN LIMINE</b>			CASE NUMBER:

This stipulation is intended to provide fast and informal resolution of evidentiary issues through diligent efforts to define and discuss such issues and limit paperwork.

The parties agree that:

1. At least \_\_\_\_ days before the final status conference, each party will provide all other parties with a list containing a one paragraph explanation of each proposed motion in limine. Each one paragraph explanation must identify the substance of a single proposed motion in limine and the grounds for the proposed motion.
2. The parties thereafter will meet and confer, either in person or via teleconference or videoconference, concerning all proposed motions in limine. In that meet and confer, the parties will determine:
  - a. Whether the parties can stipulate to any of the proposed motions. If the parties so stipulate, they may file a stipulation and proposed order with the Court.
  - b. Whether any of the proposed motions can be briefed and submitted by means of a short joint statement of issues. For each motion which can be addressed by a short joint statement of issues, a short joint statement of issues must be filed with the Court 10 days prior to the final status conference. Each side's portion of the short joint statement of issues may not exceed three pages. The parties will meet and confer to agree on a date and manner for exchanging the parties' respective portions of the short joint statement of issues and the process for filing the short joint statement of issues.
3. All proposed motions in limine that are not either the subject of a stipulation or briefed via a short joint statement of issues will be briefed and filed in accordance with the California Rules of Court and the Los Angeles Superior Court Rules.

SHORT TITLE:	CASE NUMBER:
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The following parties stipulate:

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(TYPE OR PRINT NAME)

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\_\_\_\_\_  
(ATTORNEY FOR PLAINTIFF)

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(ATTORNEY FOR DEFENDANT)

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(ATTORNEY FOR DEFENDANT)

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(ATTORNEY FOR \_\_\_\_\_)

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(ATTORNEY FOR \_\_\_\_\_)

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\_\_\_\_\_  
(ATTORNEY FOR \_\_\_\_\_)

THE COURT SO ORDERS.

Date: \_\_\_\_\_

\_\_\_\_\_  
JUDICIAL OFFICER

# **EXHIBIT B**



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NOV 20 2013

Sherri R. Carter, Executive Officer/Clerk  
By: Kandace Bowen, Deputy

1 Rafael G. Nendel-Flores, Bar No. 223358  
 2 rafael.nendelflores@ogletreedeakins.com  
 3 Allison C. Eckstrom, Bar No. 217255  
 4 allison.eckstrom@ogletreedeakins.com  
 5 Lara C. de Leon, Bar No. 270252  
 6 lara.deleon@ogletreedeakins.com  
 7 OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.  
 8 Park Tower, Suite 1500  
 9 695 Town Center Drive  
 10 Costa Mesa, CA 92626  
 11 Telephone: 714.800.7900  
 12 Facsimile: 714.754.1298

13 Attorneys for Defendant CROSSMARK, INC.

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA

15 FOR THE COUNTY OF LOS ANGELES

16 GAYLE SMITH, an individually, and on behalf  
 17 of other members of the general public similarly  
 18 situated,

19 Plaintiff,

20 vs.

21 CROSSMARK, INC., a Delaware Corporation,  
 22 and DOES 1-10, inclusive,

23 Defendant.

Case No. BC523981

[Assigned for all purposes to Honorable  
 William F. Highberger, Dept. 307]

DEFENDANT CROSSMARK, INC.'S  
 ANSWER AND AFFIRMATIVE  
 DEFENSES TO PLAINTIFF'S  
 COMPLAINT

Action Filed: October 9, 2013  
 Trial Date: None Set

24 TO PLAINTIFF GAYLE SMITH AND HER ATTORNEYS OF RECORD:

25 Defendant CROSSMARK, INC. ("Defendant") hereby responds to Plaintiff GAYLE  
 26 SMITH's ("Plaintiff") unverified Class Action Complaint (the "Complaint") as follows:

27 GENERAL DENIAL

28 Pursuant to California Code of Civil Procedure section 431.30(d), Defendant denies  
 generally and specifically each and every allegation contained in the Complaint, and denies further  
 that Plaintiff has been injured in the amount or manner alleged or in any other manner whatsoever.

///

BY FAX

1 **AFFIRMATIVE DEFENSES**

2 **FIRST AFFIRMATIVE DEFENSE**

3 The Complaint fails to state facts sufficient to constitute a cause of action against  
4 Defendant.

5 **SECOND AFFIRMATIVE DEFENSE**

6 As to each and every oral, implied, or other contractual relationship alleged in the  
7 Complaint, there was a failure of consideration.

8 **THIRD AFFIRMATIVE DEFENSE**

9 As to each and every oral, implied, or other contractual relationship alleged in the  
10 Complaint, Plaintiff failed to fulfill conditions precedent to the enforcement of any said contract.

11 **FOURTH AFFIRMATIVE DEFENSE**

12 As to each and every contract, covenant or warranty alleged in the Complaint, Plaintiff  
13 committed a prior breach thereof, excusing any duty of further performance by Defendant.

14 **FIFTH AFFIRMATIVE DEFENSE**

15 Plaintiff has failed to properly mitigate her alleged damages.

16 **SIXTH AFFIRMATIVE DEFENSE**

17 Plaintiff's claims are barred by the applicable statutes of limitations, including, but not  
18 limited to, Code of Civil Procedure sections 337(1), 338(a), 339(1), 340(a) and 343; Labor Code  
19 section 203(b), and Business and Professions Code section 17208.

20 **SEVENTH AFFIRMATIVE DEFENSE**

21 Plaintiff's claims are barred, in whole or in part, by the doctrines of equity, including,  
22 without limitation, release, waiver, estoppel, laches, and unclean hands.

23 **EIGHTH AFFIRMATIVE DEFENSE**

24 Plaintiff's claims are barred, in whole or in part, by the doctrines of *res judicata*, collateral  
25 estoppel, and/or judicial estoppel.

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1 **NINTH AFFIRMATIVE DEFENSE**

2 Plaintiff's claims are barred, in whole or in part, to the extent Plaintiff and/or the putative  
3 class members consented to any or all of the conduct about which they now complain.

4 **TENTH AFFIRMATIVE DEFENSE**

5 Plaintiff is not entitled to any penalty award under any section of the California Labor Code  
6 because at all relevant times, Defendant did not willfully, knowingly, or intentionally fail to  
7 comply with the compensation provisions of the California Labor Code, but rather acted in good  
8 faith and had reasonable grounds for believing that it did not violate those provisions.

9 **ELEVENTH AFFIRMATIVE DEFENSE**

10 Plaintiff is not entitled to any penalty award under Labor Code section 226 or any other  
11 provision of the California Labor Code because Plaintiff did not suffer any injury due to the alleged  
12 conduct of Defendant.

13 **TWELFTH AFFIRMATIVE DEFENSE**

14 Plaintiff is barred from recovering for alleged violations of Labor Code sections 226.7  
15 and/or 512 to the extent that she failed to take her meal periods in accordance with the reasonable  
16 expectations of Defendant which were made clear by Defendant in meetings and instructions  
17 provided by Defendant on multiple occasions.

18 **THIRTEENTH AFFIRMATIVE DEFENSE**

19 Plaintiff is barred from collecting meal-period premiums to the extent that she was  
20 "provided" meal periods within the meaning of Labor Code section 512 and/or Plaintiff took off-  
21 duty meal periods of at least thirty (30) minutes duration at the appropriate times as required by  
22 Section 11 of the applicable Industrial Welfare Commission Wage Order.

23 **FOURTEENTH AFFIRMATIVE DEFENSE**

24 Plaintiff's rest period claim fails because Plaintiff was authorized and permitted to take rest  
25 periods as required by § 12 of the applicable Wage Order of the Industrial Welfare Commission.

26 ///

27 ///

**FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiff's meal and rest period claims are barred, in whole or in part, by her waiver of the right to meal and/or rest periods in accordance with applicable law.

**SIXTEENTH AFFIRMATIVE DEFENSE**

Plaintiff lacks standing to assert the claims set forth in the Complaint, both on behalf of herself and on behalf of the putative class(es) alleged in the Complaint.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Defendant performed and discharged in good faith each and every obligation owed, if any, to Plaintiff, acting without malice and with the good faith belief in the propriety of its conduct.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

Defendant performed and discharged each and every obligation allegedly owed to Plaintiff, except such obligations as Defendant was excused from performing as a result of Plaintiff's conduct and failure to perform obligations.

**NINETEENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred, in whole or in part, by the doctrine of offset.

**TWENTIETH AFFIRMATIVE DEFENSE**

Plaintiff fails to state a claim for attorneys' fees against Defendant.

**TWENTY-FIRST AFFIRMATIVE DEFENSE**

Plaintiff may not recover civil penalties pursuant to the Labor Code Private Attorneys General Act, Labor Code § 2699 *et seq.*, because Plaintiff is not an aggrieved party pursuant to the terms of the Labor Code.

**TWENTY-SECOND AFFIRMATIVE DEFENSE**

Plaintiff may not recover civil penalties pursuant to the Labor Code Private Attorneys General Act, Labor Code § 2699 *et seq.*, because she failed to exhaust her administrative remedies, including, but not limited to, those provided in California Labor Code § 2699.3.

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**TWENTY-THIRD AFFIRMATIVE DEFENSE**

Awarding Plaintiff civil penalties pursuant to the Labor Code Private Attorneys General Act, Labor Code § 2699 *et seq.*, would be unjust, arbitrary and oppressive, and/or confiscatory.

**TWENTY-FOURTH AFFIRMATIVE DEFENSE**

Awarding Plaintiff civil penalties pursuant to the Labor Code Private Attorneys General Act, Labor Code § 2699 *et seq.*, would violate Defendant's constitutional rights under provisions of the United States and California Constitutions, including but not limited to the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, and because PAGA violates separation of powers principles.

**TWENTY-FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's Ninth Cause of Action under Business and Professions Code section 17200 *et seq.* is not appropriate for resolution on a representative basis and allowing such a representative claim would violate the Due Process Clause of the United States and California Constitutions.

**TWENTY-SIXTH AFFIRMATIVE DEFENSE**

Plaintiff is not entitled to an award of damages or statutory penalties under Business and Professions Code § 17200 *et seq.*

**TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff is not entitled to injunctive relief because she has an adequate remedy at law.

**TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

Plaintiff's Labor Code section 2802 claim is barred in whole or in part because Plaintiff failed to submit to Defendant any proof or documents showing that any alleged expenditures or losses were incurred by the Plaintiff in the discharge of her employment duties.

**TWENTY-NINTH AFFIRMATIVE DEFENSE**

Plaintiff's claim under Labor Code section 2802 is barred in whole or in part because any of Plaintiff's alleged expenditures or losses were not necessary and/or were not the direct consequence of the discharge of the Plaintiff's employment duties.

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### THIRTIETH AFFIRMATIVE DEFENSE

Plaintiff's causes of action cannot and should not be maintained as a class action pursuant to Federal Rule of Civil Procedure 23, California Code of Civil Procedure section 382, and any other applicable statutes or case law.

### THIRTY-FIRST AFFIRMATIVE DEFENSE

The putative class and/or classes alleged in the Complaint are overbroad, ambiguous, conclusory, lack the required community of interest, and are not precise, objective or readily ascertainable.

### THIRTY-SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred, in whole or part, to the extent that Plaintiff has failed to allege facts sufficient to meet the necessary requirements for class certification, including typicality, commonality, numerosity, superiority, and/or adequacy.

### THIRTY-THIRD AFFIRMATIVE DEFENSE

Plaintiff and her counsel are not adequate representatives of those they purport to represent.

### THIRTY-FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims and the claims of the putative class members are or may be barred by the doctrines of accord and satisfaction, payment, release, and/or waiver because, in part, Plaintiff and the putative class members have expressly agreed to release, hold harmless and indemnify Defendant from any and all liability and responsibility regarding the claims asserted in this action.

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1           **WHEREFORE**, Defendant prays for judgment as follows:

- 2                   1.     That Plaintiff take nothing by way of her Complaint;
- 3                   2.     That class certification be denied;
- 4                   3.     That the Court enter judgment for Defendant and against Plaintiff on all her
- 5                   alleged claims;
- 6                   4.     That the Court award Defendant its costs of suit; and
- 7                   5.     That the Court grant Defendant such other and further relief that the Court
- 8                   deems just and proper.

9

10          DATED: November 20, 2013

OGLETREE, DEAKINS, NASH, SMOAK &  
STEWART, P.C.

11

12

13          By: 

Rafael G. Nendel-Flores  
Allison C. Eckstrom  
Lara C. de Leon

14

15

16          Attorneys for Defendant CROSSMARK, INC.

**PROOF OF SERVICE***Gayle Smith v. CROSSMARK, Inc., et al.*

Case No. BC523981

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of Orange in the office of a member of the bar of this court at whose direction the service was made. My business address is Park Tower, Suite 1500, 695 Town Center Drive, Costa Mesa, CA 92626.

On November 20, 2013, I served the following document(s):

**DEFENDANT CROSSMARK, INC.'S ANSWER AND AFFIRMATIVE  
DEFENSES TO PLAINTIFF'S COMPLAINT**

by placing ☐ (the original) ☒ (a true copy thereof) in a sealed envelope addressed as follows:

Shawn C. Westrick  
Timothy P. Hennessy  
KAWAHITO SHRAGA & WESTRICK LLP  
1990 S. Bundy Drive, Suite 280  
Los Angeles, CA 90025  
Telephone: (310) 746-5300  
Facsimile: (310) 593-2520

*Attorneys for Plaintiff*  
GAYLE SMITH

Email: [swestrick@kswlawyers.com](mailto:swestrick@kswlawyers.com)  
[thennessy@kswlawyers.com](mailto:thennessy@kswlawyers.com)

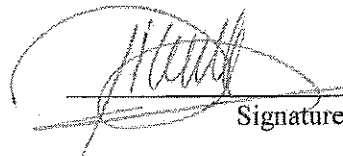
☒ **BY MAIL:** I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.'s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **BY OVERNIGHT DELIVERY:** I placed the sealed envelope(s) or package(s) designated by the express service carrier for collection and overnight delivery by following the ordinary business practices of Ogletree, Deakins, Nash, Smoak & Stewart P.C., San Francisco, California. I am readily familiar with Ogletree, Deakins, Nash, Smoak & Stewart P.C.'s practice for collecting and processing of correspondence for overnight delivery, said practice being that, in the ordinary course of business, correspondence for overnight delivery is deposited with delivery fees paid or provided for at the carrier's express service offices for next-day delivery.

☒ **(STATE):** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 20, 2013, at Costa Mesa, CA.

Diane Vo  
Type or Print Name

  
Signature

# EXHIBIT C

1 KENNETH S. GAINES, SBN 049045  
ken@gaineslawfirm.com

2 DANIEL F. GAINES, SBN 251488  
daniel@gaineslawfirm.com

3 ALEX P. KATOFSKY, SBN 202754  
alex@gaineslawfirm.com

4 **GAINES & GAINES, APLC**  
21550 Oxnard Street, Suite 980  
5 Woodland Hills, CA 91367  
Telephone: (818) 703-8985  
6 Facsimile: (818) 703-8984

7 Attorneys for Plaintiff  
ERICKA MITCHELL

8  
9 STEPHEN E. FOX (Admitted *pro hac vice*)  
sfox@fr.com

10 JOHN MICHAEL GADDIS (Admitted *pro hac vice*)  
gaddis@fr.com

11 **FISH & RICHARDSON P.C.**  
1717 Main Street, Suite 5000  
12 Dallas, TX 75201  
Telephone: (214) 747-5070  
13 Facsimile: (214) 747-2091

14 Attorneys for Defendants  
CROSSMARK, INC., CHI MANAGEMENT GROUP, LP, and CROSSMARK  
15 HOME IMPROVEMENT SERVICES, LLC

16 **UNITED STATES DISTRICT COURT**

17 **CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION**

18  
19 ERICKA MITCHELL, on behalf of  
herself and all others similarly situated,  
20 and on behalf of the general public,

21 Plaintiffs,

22 vs.

23 CROSSMARK, INC., CHI  
MANAGEMENT GROUP, LP,  
24 CROSSMARK HOME  
IMPROVEMENT SERVICES, LLC,  
25 and DOES 2 through 50, inclusive,

26 Defendants.  
27  
28

Case No. CV 11-2818-JAK (FMOx)

**JOINT STIPULATION OF  
SETTLEMENT AND RELEASE**

1 This Joint Stipulation of Settlement and Release is made and entered into  
2 between Plaintiff ERICKA MITCHELL, as an individual and as a representative of  
3 the Class ("Plaintiff"), and Defendants CROSSMARK, INC., CHI MANAGEMENT  
4 GROUP, LP, and CROSSMARK HOME IMPROVEMENT SERVICES, LLC  
5 (together, "CROSSMARK" or "Defendants"), who are parties to the above-captioned  
6 litigation (together, the "Parties").

7 It is hereby stipulated and agreed, by and between the undersigned Parties,  
8 subject to approval of the Court, that the settlement of this action shall be effectuated  
9 upon and subject to the following terms and conditions:

10 **I. DEFINITIONS**

11 The following capitalized terms, when used in this Joint Stipulation of  
12 Settlement and Release, shall have the following meanings:

13 1. "Action" or "Instant Action" means the above stated action, styled as  
14 *Ericka Mitchell v. CROSSMARK, Inc., et al.*, U.S. District Court, Central District of  
15 California Case No. CV 11-2818-JAK (FMOx).

16 2. "Claims Administrator" means a reputable third-party Claims  
17 Administrator, to be selected by the Parties, to administer this Settlement.

18 3. "Class" and "Settlement Class" mean all persons who are, have been, or  
19 will be employed by Defendants in the State of California as an hourly, non-exempt  
20 employee from October 8, 2006 through the Date of Preliminary Approval of this  
21 Settlement.

22 4. "Class Counsel" means the law firms of Gaines & Gaines, APLC,  
23 Steven L. Miller, APLC, and Law Offices of Scott A. Miller, APC.

24 5. "Class Member" means each person eligible to participate in this  
25 Settlement who is a member of the Class defined above.

26 6. "Class Member Released Claims" shall mean a release of Settling  
27 Defendants of any and all claims that were or could have been asserted in the Instant  
28 Action based upon the facts alleged therein, and any and all claims, whether brought

1 directly, representatively, or in any capacity, under any theory whatsoever, whether in  
2 tort, contract, statute, rule, ordinance, order, regulation, or otherwise, including state,  
3 federal, and local laws, whether for economic damages, non-economic damages,  
4 restitution, penalties, punitive damages, wages, premium payments, liquidated  
5 damages, attorneys' fees, or any other type of recovery thereon, arising out of any act,  
6 omission, transaction, or event that occurred or is alleged to have occurred up to the  
7 date of this Agreement, to the extent that such claims arise out of the alleged facts,  
8 circumstances, and occurrences underlying the allegations as set forth in the  
9 Plaintiff's Complaint or in any Amended Complaint filed in this Action. Claims  
10 specifically included in this release, without limitation, include any and all claims  
11 arising under the IWC Wage Orders; California Labor Code, including, without  
12 limitation, §§ 510, 1194, 226, 201-203, 204, and 2802; California Business &  
13 Professions Code §§17200 *et seq.*; and any and all claims under the Private Attorney  
14 General Act (California Labor Code Sections 2698 *et seq.*) relating to the claims  
15 being released herein. Class Members shall be deemed to have expressly waived and  
16 relinquished, to the fullest extent permitted by law, the provisions, rights, and benefits  
17 they may otherwise have had relating to the Class Member Released Claims pursuant  
18 to Section 1542 of the California Civil Code, which provides as follows:

19 A general release does not extend to claims which the  
20 creditor does not know or suspect to exist in his or her favor  
21 at the time of executing the release, which if known to him  
22 or her must have materially affected his or her settlement  
with the debtor.

23 All Class Members shall be bound by this release unless they formally opt-out  
24 of the Settlement.

25 7. "Class Period" shall mean the time period from October 8, 2006 through  
26 the Date of Preliminary Approval of this Settlement.

27 8. "Class Representative Released Claims" means a general release of  
28 Settling Defendants, as defined herein, of any and all claims, obligations, demands,



Case 2:11-cv-02818-JAK -FMO Document 69-2 Filed 01/16/12 Page 5 of 33 Page ID  
#:1256

1 actions, rights, causes of action, and liabilities against Settling Defendants, of  
2 whatever kind and nature, character, and description, whether in law or equity,  
3 whether sounding in tort, contract, federal, state and/or local law, statute, ordinance,  
4 regulation, common law, or other source of law, whether known or unknown, and  
5 whether anticipated or unanticipated, including unknown claims covered by Civil  
6 Code Section 1542, by Class Representative, arising during the period from the  
7 beginning of the Class Representative's first date of employment with Settling  
8 Defendants to the date on which the Court enters the Order of Preliminary Approval,  
9 for any type of relief, including, without limitation, claims for failure to pay overtime,  
10 failure to pay for all hours worked, failure to timely pay final wages, failure to  
11 provide meal and rest periods, failure to furnish accurate wage statements, wrongful  
12 termination, retaliation, damages, unpaid costs, penalties (including waiting time  
13 penalties), liquidated damages, punitive damages, interest, attorneys' fees, litigation  
14 costs, restitution, or equitable relief. The Class Representative Released Claims  
15 include, but are not limited to the Class Member Released Claims as well as any other  
16 claims under any provision of the Fair Labor Standards Act, the California Labor  
17 Code or any applicable California Industrial Welfare Commission Wage Orders, and  
18 claims under state or federal discrimination statutes, including, without limitation, the  
19 California Fair Employment and Housing Act, California Government Code § 12940  
20 *et seq.*; the Unruh Civil Rights Act, California Civil Code § 51 *et seq.*; the California  
21 Constitution; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*; the  
22 Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; and the Employee  
23 Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*; and all of their  
24 implementing regulations and interpretive guidelines, as set forth in the Complaint  
25 and Amended Complaints in this Action. The Class Representative shall be deemed  
26 to have expressly waived and relinquished, to the fullest extent permitted by law, the  
27 provisions, rights, and benefits she may otherwise have had relating to the released  
28

1 claims pursuant to Section 1542 of the California Civil Code, which provides as  
2 follows:

3 A general release does not extend to claims which the  
4 creditor does not know or suspect to exist in his or her favor  
5 at the time of executing the release, which if known to him  
6 or her must have materially affected his or her settlement  
with the debtor.

7 9. "Class Representative," "Named Plaintiff," and "Plaintiff" shall mean  
8 Plaintiff Ericka Mitchell.

9 10. "Compensable Pay Periods" means and refers to the number of pay  
10 periods during the Class Period during which a Class Member was employed by  
11 Defendants in California as a non-exempt, hourly employee. Compensable Pay  
12 Periods will be calculated by the Claims Administrator based on inception and  
13 termination dates for weeks worked as a non-exempt, hourly employee during the  
14 Class Period.

15 11. "Complaint" shall mean the operative Complaint in the above-entitled  
16 Action, originally filed on or about October 8, 2010.

17 12. "Court" shall mean the U.S. District Court, Central District of  
18 California.

19 13. "Date of Preliminary Approval" means the date the Court approves this  
20 Stipulation of Settlement, and the exhibits thereto, and enters an Order providing for  
21 notice to the Class, an opportunity to opt-out of the Class, an opportunity to submit  
22 timely objections to the settlement, and setting a hearing for Final Approval of the  
23 Settlement, including approval of attorneys' fees and costs.

24 14. "Deficient Opt-Out Form" means a Request for Exclusion that is not  
25 signed by the Class Member submitting the Request for Exclusion or cannot be  
26 verified by the Claims Administrator as being an authentic submission by the Class  
27 Member.  
28

1           15. "Deficient Opt-Out" means a Class Member that has submitted a  
2 Deficient Opt-Out Form and has failed to cure its deficiencies.

3           16. "Defendants' Counsel" means Fish & Richardson, PC.

4           17. "Effective Date" means the date of entry of an Order granting final  
5 approval of the Settlement, unless one or more objections to the Settlement are filed  
6 which are not subsequently withdrawn, in which case it means the date one day after  
7 the expiration date of the time for the filing or noticing of any appeal from the Order  
8 and Final Judgment, or if an appeal is filed, the date of final dismissal of any appeal  
9 from the Order and Final Judgment.

10          18. "Exclusion Form" or "Request for Exclusion Form" means the document  
11 attached hereto as Exhibit 2.

12          19. "Exclusion Period" means a period of thirty (30) calendar days from the  
13 date the Claims Administrator mails the Settlement Documents to Class Members. If  
14 the 30th day falls on a Sunday or holiday, the Exclusion Period shall end on the next  
15 business day that is not a Sunday or holiday.

16          20. "Late Opt-Out Form" means a Request for Exclusion that is submitted  
17 to the Claims Administrator after the end of the Exclusion Period.

18          21. "Late Opt-Out" means a Class Member that has submitted a Late Opt-  
19 Out Form.

20          22. "LWDA" means the California Labor and Workforce Development  
21 Agency.

22          23. "Maximum Settlement Amount" is the sum of Nine Hundred Ninety-  
23 Nine Thousand Nine Hundred Ninety-Nine U.S. Dollars and Ninety-Nine Cents  
24 (\$999,999.99), which represents the total amount payable in this settlement by  
25 Settling Defendants, which includes all attorneys' fees, litigation costs, claims  
26 administration fees, payments to the LWDA, interest, and the Service Enhancement  
27 to the Class Representative. The Defendants shall have no reversionary interest in  
28 any portion of the Maximum Settlement Amount, and the entire amount shall be paid

1 as part of this Settlement. The Maximum Settlement Amount does not include  
2 employer payroll taxes related to the amount paid under the Settlement.

3 24. "Net Settlement Amount" is the portion of the Maximum Settlement  
4 Amount eligible for distribution to Qualified Claimants and is approximately  
5 \$605,000. It equals the Maximum Settlement amount less Class Counsel's attorneys'  
6 fees and actual litigation costs, claims administration expenses, payments to the  
7 LWDA for PAGA penalties, and the Service Enhancement to the Class  
8 Representative.

9 25. "Notice of Class Action Settlement" shall mean the document attached  
10 hereto as Exhibit 1.

11 26. "PAGA" shall mean the California Labor Code Private Attorneys  
12 General Act, California Labor Code §§ 2698 *et seq.*

13 27. "Parties" shall mean Defendants and Plaintiff.

14 28. "Qualified Claimant" means a Class Member who has not opted-out of  
15 the Settlement, *i.e.*, one who has not timely submitted a valid Request for Exclusion  
16 from the Settlement to the Claims Administrator.

17 29. "Settling Plaintiffs" shall mean all Class Members who do not submit a  
18 valid Request for Exclusion from the Settlement to the Claims Administrator.

19 30. "Settling Defendants" or "CROSSMARK" shall mean CROSSMARK,  
20 Inc., CHI Management Group, LP, CROSSMARK Home Improvement Services,  
21 LLC, and all related companies, subsidiaries, entities, future and former direct and  
22 indirect parents, affiliates, successors and predecessors, and current and former  
23 employees, attorneys, officers and directors of said entities.

24 31. "Settling Parties" shall mean the Settling Defendants and Settling  
25 Plaintiffs.

26 32. "Settlement Documents" shall mean the Notice of Class Action  
27 Settlement (Exhibit 1) and the Request for Exclusion Form (Exhibit 2) attached  
28 hereto.

1           33. "Stipulation of Settlement" and "Settlement Agreement" shall mean this  
2 Joint Stipulation of Settlement and Release.

3       **II. DESCRIPTION OF THE LITIGATION**

4           34. On October 8, 2010, Plaintiff filed a lawsuit against CROSSMARK,  
5 Inc., CHI Management Group, LP, and Does 1-50, in the Superior Court for the State  
6 of California, in and for the County of Ventura, Case Number 56-2010-00383153-  
7 CU-OE-SIM. CROSSMARK removed the Action to the U.S. District Court for the  
8 Central District of California, where it is presently assigned case number No. CV 11-  
9 2818-JAK (FMOx). CROSSMARK Home Improvement Services, LLC was  
10 subsequently added as a party to the Action.

11           34. Plaintiff seeks to represent a putative class of current and former  
12 CROSSMARK employees in California. The operative complaint alleges causes of  
13 action under the California Labor Code and Business & Professions Code: violation  
14 of Labor Code §§ 201-203 for failure to pay all wages due at separation of  
15 employment, Labor Code § 204 for failure to pay all wages timely throughout the  
16 course of employment, Labor Code §§ 510 and 1194 for failure to pay all wages due  
17 for time spent driving between work locations, Labor Code § 226 and IWC Wage  
18 Order 4-2001(7) for failure to issue accurately itemized employee wage statements,  
19 Labor Code § 2802 for failure to fully reimburse employee business expenses  
20 incurred in the discharge of their employment duties, including while driving for  
21 work purposes, and violation of Bus. & Prof. Code §§ 17200 *et seq.* Plaintiff seeks  
22 damages, restitution, civil penalties under PAGA, and injunctive relief.

23           35. This Settlement embraces all claims against Settling Defendants as  
24 enumerated in paragraphs 6 and 8 above, including, but not limited to, all claims in  
25 the Complaint for violations of California's Labor Code and Wage Orders,  
26 California's Unfair Competition Law, all related and derivative claims, statutory  
27 penalties including civil penalties under PAGA, attorneys' fees, costs, and interest.  
28

1 **III. POSITION OF THE PARTIES**

2 36. Plaintiff alleges in her Complaint that, during the applicable limitations  
3 period, CROSSMARK failed to pay its non-exempt, hourly employees all wages due  
4 for time spent traveling between store locations (as distinguished from time spent  
5 traveling from an employee's home to his/her first work location of the day, and from  
6 the employee's last work location of the day to his/her home), resulting in a claim  
7 under Labor Code §§ 510 and 1194. Plaintiff further alleges, that as a result,  
8 CROSSMARK failed to timely pay all wages to its non-exempt, hourly employees,  
9 and failed to timely pay those employees all wages due at termination, resulting in  
10 derivative claims under Labor Code §§ 204 and 201-203. Plaintiff also alleges in her  
11 Complaint that CROSSMARK issued defective wage statements to its California  
12 non-exempt employees, in violation of Labor Code § 226(a) and (e) and IWC Wage  
13 Order 4-2001(7). Plaintiff further alleges that CROSSMARK failed to fully  
14 reimburse employees for expenses they incurred in the performance of their job  
15 duties, including automobile-related expenses, in violation of Labor Code § 2802.  
16 Plaintiff further alleges unfair competition claims derivative of these alleged  
17 violations under Business & Profession Code §§ 17200 *et seq.*, and also seeks to  
18 recover civil penalties for these alleged violations under the Private Attorney General  
19 Act, Labor Code §§ 2698 *et seq.*

20 37. Settling Defendants deny these claims in their entirety. Consequently,  
21 Settling Defendants do not believe that any liability to Plaintiff or Class Members  
22 exists, or that Plaintiff or Class Members are entitled to any recovery. In addition,  
23 Settling Defendants contend that Plaintiff's claims are not suitable for class or  
24 representative treatment.

25 38. On September 9, 2011, the Parties participated in a mediation with  
26 mediator Brenda Cabbage in Dallas, Texas. Following mediation, the Parties were  
27 unable to reach a settlement. With the mediator's continued assistance, the Parties  
28 continued settlement discussions and on or about November 9, 2011, key terms of a



1 settlement agreement were reached. All of the terms of the Parties' settlement are  
2 contained within this Stipulation of Settlement. At all times, the Parties' settlement  
3 negotiations have been non-collusive, adversarial, and at arm's length.

4 39. Discussions between counsel for the Parties, formal and informal  
5 discovery, as well as the investigation and evaluation of the claims of Plaintiff by the  
6 Parties, have permitted each side to assess the relative merits of the claims and the  
7 defenses to those claims. The Parties agree that the above-described investigation  
8 and evaluation, as well as the information exchanged during settlement negotiations  
9 and mediation, are more than sufficient to assess the merits of the respective Parties'  
10 positions and to compromise the issues on a fair and equitable basis. Based on their  
11 own independent investigations and evaluations, Class Counsel is of the opinion that  
12 the Settlement with Settling Defendants for the consideration and terms set forth  
13 below, considering the representative and class claims, and the risk of loss, is fair,  
14 reasonable, and adequate in light of all known facts and circumstances, and is in the  
15 best interests of the Class. Class Counsel is also of the opinion that the total  
16 consideration and payment set forth in this Stipulation of Settlement is adequate in  
17 light of the uncertainties surrounding the risk of further litigation, and the possible  
18 defenses and offset claims that Settling Defendants have asserted and could assert.

19  
20 **IV. BENEFITS OF THE SETTLEMENT TO THE PROPOSED CLASS AND**  
21 **DEFENDANT**

22 40. Class Counsel recognizes the substantial monetary benefit to the Class  
23 and the expenses and length of continued proceedings necessary to prosecute the  
24 Action against the Settling Defendants through class certification, trial and possible  
25 appeals. Class Counsel has also taken into account the uncertain outcome and risk of  
26 any litigation, especially in complex actions such as class actions, as well as the  
27 difficulties and delay inherent in such litigation. Therefore, Class Counsel has  
28 determined that the settlement set forth in this Stipulation of Settlement is in the best  
interest of the Class.

1           41. Settling Defendants and their counsel have similarly concluded that it is  
2 desirable that the Action be settled in a manner and upon such terms and conditions  
3 set forth herein in order to avoid further expense, inconvenience and distraction of  
4 further legal proceedings, and the risk of the outcome of the Action. Therefore,  
5 Settling Defendants have determined that it is desirable and beneficial to put to rest  
6 the claims in the Action.

7       **V. OPERATIVE TERMS OF SETTLEMENT**

8           The Parties to this Action agree as follows:

9           42. Non-Admission. Nothing in this Stipulation of Settlement shall be  
10 construed to be or deemed an admission by Settling Defendants of any liability,  
11 culpability, negligence, or wrongdoing toward the Class Representative, the Class  
12 Members, or any other person, and Settling Defendants specifically disclaim any  
13 liability, culpability, negligence, or wrongdoing toward the Class Representative, the  
14 Class Members, or any other person, and specifically deny that class certification or  
15 representative action is appropriate. Each of the Parties has entered into this  
16 Stipulation of Settlement with the intention to avoid further disputes and litigation  
17 with the attendant inconvenience, expenses, and contingencies. This Stipulation of  
18 Settlement, and any related court documents or orders, may not be cited or otherwise  
19 admitted as evidence of liability or that class certification or representative action is  
20 appropriate. There has been no final determination by any Court as to the merits of  
21 the claims asserted by Plaintiff against Settling Defendants, or as to whether a class  
22 should be certified, or whether a representative action should proceed, other than for  
23 settlement purposes only.

24           43. Conditional Certification of the Settlement Class. The Parties stipulate  
25 to the conditional certification of the Settlement Class as defined herein for settlement  
26 purposes only. This provision is void and all terms of this Settlement are void if this  
27 Settlement is not approved by the Court. The parties further stipulate that, for  
28 settlement purposes only, the law firms of Gaines & Gaines APLC, Steven L. Miller,

1 APC, and Law Offices of Scott A. Miller, APLC may be appointed as Class Counsel,  
2 and that Plaintiff Ericka Mitchell may be appointed the Class Representative.  
3 CROSSMARK's stipulation to this settlement class shall not be construed as an  
4 admission or acknowledgement of wrongdoing of any kind, or that any class should  
5 be certified or given collective action treatment, or that any representative action  
6 should proceed.

7 44. Allocations to be Paid from the Maximum Settlement Amount. Settling  
8 Defendants shall pay Nine Hundred Ninety-Nine Thousand Nine Hundred Ninety-  
9 Nine U.S. Dollars and Ninety-Nine Cents (\$999,999.99) as the Maximum Settlement  
10 Amount to resolve the Action on a class-wide basis. Under no circumstances will  
11 Settling Defendants be obligated to pay any more than the Maximum Settlement  
12 Amount of Nine Hundred Ninety-Nine Thousand Nine Hundred Ninety-Nine U.S.  
13 Dollars and Ninety-Nine Cents (\$999,999.99). The Parties agree to the following  
14 allocations to be paid from the Maximum Settlement Amount, subject to Court  
15 approval:

- 16 a. From the Maximum Settlement Amount, \$25,000.00 shall be  
17 payable to the California Labor and Workforce Development  
18 Agency ("LWDA"), representing the LWDA's share of PAGA  
19 penalties.
- 20 b. From the Maximum Settlement Amount, Class Counsel may seek  
21 from the Court a maximum of \$300,000.00 in attorneys' fees, and  
22 a maximum of \$15,000.00 in actual litigation costs, for serving as  
23 Class Counsel, both of which CROSSMARK will not oppose.
- 24 c. From the Maximum Settlement Amount, the Class Representative  
25 may seek from the Court an incentive payment not to exceed  
26 \$10,000.00 for serving as Class Representative ("Service  
27 Enhancement"), which CROSSMARK will not oppose. This  
28 incentive payment will also compensate Class Representative for

1 the release of her individual claims against Defendants, as  
2 enumerated in Paragraph 8 above.

3 d. From the Maximum Settlement Amount, settlement  
4 administration fees in a reasonable amount, which are estimated to  
5 be approximately \$45,000. Settlement administration fees shall  
6 include the costs of providing the notices required by 28 U.S.C. §  
7 1715(b). CROSSMARK shall be responsible for paying the  
8 settlement administration fees to the settlement administrator even  
9 if this Settlement is not given final approval by the Court.

10 e. Any portion of the Maximum Settlement Amount remaining after  
11 payment of the costs of administration, attorneys' fees, litigation  
12 costs, class representative enhancement, and that portion of PAGA  
13 penalties payable to the California LWDA, shall be paid to  
14 Qualified Claimants.

15 f. If the Court approves a lesser amount of attorneys' fees, litigation  
16 costs, administration costs, or Service Enhancement than those  
17 sought by the Class Representative and Class Counsel, any  
18 amount disallowed by the Court shall become part of the Net  
19 Settlement Amount for distribution to Class Members. The  
20 Parties agree that the settlement shall remain binding with such  
21 modification(s) and its terms will be otherwise unchanged.

22 45. Tax Treatment. Settlement payments to Qualified Claimants shall be  
23 treated as follows: 25% wages, 25% expense reimbursement, 25% penalties, and 25%  
24 interest. The wage portion of the settlement payments to Qualified Claimants shall be  
25 subject to withholding. Class Representative and Qualified Claimants shall be  
26 exclusively liable for any and all tax liability, if any. Class Representative and  
27 Qualified Claimants should consult with their tax advisors concerning the tax  
28 consequences of the payments they receive under the Settlement.

1           46. Class Member Released Claims. Upon Final Approval, each Settling  
2 Plaintiff and each member of the Class who has not opted out of the Settlement shall  
3 be deemed to have fully, finally, and forever released Settling Defendants from all  
4 Class Member Released Claims for the period of time during which they were  
5 employed by one or more Defendants as a non-exempt, hourly employee in the State  
6 of California between October 8, 2006 through the date of Preliminary Approval.

7           47. Class Representative Released Claims. Upon Final Approval, the Class  
8 Representative shall be deemed to have fully, finally, and forever released Settling  
9 Defendants from all Class Representative Released Claims through the date of  
10 Preliminary Approval.

11           48. Calculation of Settlement Amounts. The Claims Administrator will  
12 calculate pro rata settlement payments to Class Members based on each Class  
13 Member's relative percentage of eligible service time in Compensable Pay Periods  
14 during the Class Period as reflected in CROSSMARK's internal records as set forth  
15 in this paragraph. After deducting for attorney's fees, litigation costs, the Service  
16 Enhancement, the payment to the LWDA, and claims administration fees, the  
17 remainder of the Maximum Settlement Amount will be allocated to Class Members  
18 as the "Net Settlement Amount." The Parties agree that the following formula for  
19 allocating the settlement payments to Class Members provided herein is reasonable  
20 and that the settlement payments provided herein are designed to provide a fair  
21 settlement to the Class:

- 22           a. The number of Compensable Pay Periods that each Class Member  
23 was employed during the Class Period shall be determined;  
24           b. The number of Compensable Pay Periods that all Class Members  
25 were employed during the Class Period shall be aggregated;  
26           c. The percentage obtained by dividing the number of Compensable  
27 Pay Periods for an individual Class Member by the aggregate of  
28 all Compensable Pay Periods for all Class Members during the



1 Class Period shall be used to calculate that individual Class  
2 Member's share of the Net Settlement Amount.

3 49. Qualified Claimants. Unless a Class Member submits a timely opt-out  
4 request as described below, he or she shall be deemed a Qualified Claimant and shall  
5 be eligible to receive a Settlement Payment. There is no claims process and all  
6 Qualified Claimants shall be mailed their Settlement Payment following the Court's  
7 final approval of the Settlement. All Qualified Claimants will be bound by the  
8 Settlement and its releases, even if they fail to negotiate their Settlement Payment  
9 check prior to its expiration date.

10 50. Timing and Distribution of Settlement Funds and Payments. When and  
11 if the Court grants Final Approval of the Settlement, and the Effective Date as  
12 defined above has passed, the Settlement Administrator shall prepare a final list of all  
13 Qualified Claimants who have not timely opted-out of the settlement. For each  
14 Qualified Claimant on this list, the Settlement Administrator will calculate the  
15 amounts due and issue checks payable to said Qualified Claimants. CROSSMARK  
16 shall provide all payments required by this Settlement to the Settlement  
17 Administrator within seven (7) calendar days following the Effective Date. The  
18 Settlement Administrator shall issue payments to Plaintiff, Class Counsel, and the  
19 LWDA no later than ten (10) calendar days following the Effective Date and mail  
20 settlement checks to Qualified Claimants no later than twenty-one (21) calendar days  
21 following the Effective Date.

22 51. Court Approval of the Settlement. Subject to CROSSMARK's approval,  
23 Class Counsel shall be responsible for preparing and filing, in coordination with  
24 Defendants' Counsel, the Unopposed Motion for Preliminary Approval of the  
25 Settlement and the Motion for Final Approval of the Settlement. Prior to the Final  
26 Approval hearing by the Court, the Parties will submit a proposed Final Order(s):  
27 (i) certifying the Class for settlement purposes only; (ii) finding the settlement fair,  
28 reasonable, and in the best interests of the Class Members; (iii) approving Class



1 Counsel's application for an award of attorneys' fees and litigation costs;  
2 (iv) approving the Class Representative's application for a Service Enhancement; (v)  
3 approving payment of claims administration fees; and (vi) entering Judgment.

4 52. Termination of Settlement Agreement. If the conditions of the  
5 Settlement set forth in this Stipulation of Settlement are not satisfied, or if the Court  
6 does not dismiss the Action with prejudice against Settling Defendants as provided  
7 for in this Stipulation, or if appellate review is sought and on such review the Court's  
8 decision is materially modified or reversed, or, if one or more of the terms of the  
9 Stipulation of Settlement is not approved or the Stipulation with respect to one or  
10 more such terms is materially modified or reversed, then this Stipulation shall be  
11 canceled, terminated, and shall have no force or effect. If Final Approval does not  
12 occur, or if this Stipulation of Settlement is terminated, revoked, or canceled pursuant  
13 to its terms, the Parties to this Stipulation of Settlement shall be deemed to have  
14 reverted to their respective status as of the date and time immediately prior to the  
15 execution of this Stipulation of Settlement.

16 **VI. CLAIMS ADMINISTRATION**

17 53. Selection and Compensation of Claims Administrator. The Parties agree  
18 to jointly select and utilize a third-party Claims Administrator to give notice of and  
19 communicate with Class Members regarding the settlement. Reasonable consent to  
20 the selection of the Claims Administrator will not be withheld by either Party. If the  
21 actual cost of claims administration is less than the amount approved by the Court,  
22 those funds shall become part of the Net Settlement Amount for allocation to Class  
23 Members. All costs associated with claims administration shall come out of the  
24 Maximum Settlement Amount.

25 54. Claims Administration. CROSSMARK will provide the names, contact  
26 information, social security numbers, and dates of employment for members of the  
27 Class ("Class Data") to the Claims Administrator only. CROSSMARK will provide  
28 the Class Data to the Claims Administrator no later than thirty (30) calendar days

1 after the Court grants Preliminary Approval of the Settlement. Class Data shall only  
2 be used by the Claims Administrator for the purpose of calculating settlement shares  
3 and notifying the Class Members of the settlement. Addresses for Class Members  
4 shall not be disclosed to Class Counsel, the Class Representative, or any other Class  
5 Members without the written consent of CROSSMARK or by order of the Court.  
6 The Claims Administrator shall run the Class Data list through the National Change  
7 of Address database, and will use the most recent address for each Class Member —  
8 either from CROSSMARK's records or the National Change of Address database —  
9 when mailing the Class Notice. The Claims Administrator shall also take reasonable  
10 steps to locate any Class Member whose Class Notice is returned as undeliverable.  
11 Class Data shall be provided in a format to be determined by the Claims  
12 Administrator and CROSSMARK.

13 55. Class Notice. Within fourteen (14) calendar days of receiving the Class  
14 Data list, the Claims Administrator shall mail Settlement Documents, consisting of  
15 the Court-approved Notice of the Class Action Settlement, in the form substantially  
16 similar to that attached hereto as Exhibit 1, and a court-approved Request for  
17 Exclusion Form, in form substantially similar to that attached hereto as Exhibit 2, to  
18 the Class Members described herein. The Class Notice shall state the estimated  
19 minimum settlement payment that the Class Member could receive if he or she does  
20 not request exclusion from the Settlement.

21 56. Challenges to Class Member's Employment Data. In calculating each  
22 individual Class Member's share of the settlement, CROSSMARK's records  
23 regarding the employment tenure of Class Members shall be presumed to be correct.  
24 Class Members who challenge CROSSMARK's records must submit a challenge in  
25 writing to the Claims Administrator and will bear the burden of proof, i.e., a Class  
26 Member who fails to provide written proof will have his or her challenge denied. All  
27 such challenges must be received within the 30-day Exclusion Period during which  
28 Class Members may opt-out from the Settlement. CROSSMARK will investigate the

1 challenge and determine whether any additional amount is owed to the Class Member  
2 making the challenge. In no case will a challenge to employment data result in a  
3 payment by CROSSMARK in excess of the Maximum Settlement Amount.

4 57. Opt-Outs/Requests for Exclusion from the Settlement. Class Members  
5 who wish to "opt-out" of and be excluded from the Settlement must submit a written  
6 Request for Exclusion from the Settlement bearing a post-mark from a date within the  
7 Exclusion Period. If a Class Member submits a deficient opt-out, the Settlement  
8 Administrator shall notify the Class Member of the deficiency within five (5)  
9 business days of receipt. The Class Member shall have until the end of the Exclusion  
10 Period to cure said deficiencies, at which point his or her Request for Exclusion will  
11 be rejected if not received. Class Members submitting untimely or deficient Requests  
12 for Exclusions shall be bound by the Settlement and will be considered Qualified  
13 Claimants for settlement distribution purposes.

14 58. Time for Filing Motions for Final Approval of the Settlement and  
15 Approval of Attorneys' Fees and Costs, Settlement Administration Expenses, and  
16 Class Representative's Service Enhancement. Plaintiff and Class Counsel shall file  
17 and serve their motion for final approval of the Settlement and their motion for  
18 approval of attorney's fees, litigation costs, settlement administrator expenses, and  
19 Service Enhancement, along with all supporting evidence, no later than seven (7)  
20 calendar days following the conclusion of the Exclusion Period in order to allow  
21 Class Members a reasonable opportunity to object to said motions.

22 59. Objections. All objections to the Settlement by any Qualified Claimant  
23 must be filed with the District Court and served upon all counsel of record by no later  
24 than fourteen (14) calendar days after the end of the Exclusion Period. This deadline  
25 applies notwithstanding any argument regarding non-receipt of the notice. Anyone  
26 who fails to file and serve timely written objections in this manner shall be deemed to  
27 have waived any objections and shall be foreclosed from making any objection to the  
28

1 Settlement and from filing any appeal from any final approval order issued by the  
2 Court.

3 60. Response to Objections. Plaintiff and/or CROSSMARK may file a  
4 response to objections to the Settlement no later than twenty-eight (28) calendar days  
5 following the end of the Exclusion Period.

6 **VII. MISCELLANEOUS PROVISIONS**

7 61. Drafting. The Parties hereto agree that the terms and conditions of this  
8 Settlement Agreement are the result of lengthy, intensive, arm's-length negotiations  
9 between the Parties and that neither Party shall be considered the "drafter" of this  
10 Stipulation of Settlement for purposes of having terms construed against that Party.

11 62. Class Information Confidential. Names of Class Members and their  
12 allocation amounts shall be kept strictly confidential by the Claims Administrator,  
13 who will not release such information to Class Counsel and will file such  
14 information, if necessary, only under seal. Class Counsel agrees that any information  
15 they receive or have received in connection with this Settlement may be used for this  
16 Action only, and may not be used for any purpose or in any other action or  
17 proceeding.

18 63. Non-Disclosure. Class Representative and Class Counsel agree not to  
19 disclose the terms of this Settlement except in court papers, in response to Class  
20 Member inquiries, or if required by legal process. Neither Class Representative nor  
21 Class Counsel, directly or indirectly, shall issue a press release, hold a press  
22 conference, publish information about the settlement on any website (other than used  
23 by the claims administrator for claims administration purposes), or otherwise  
24 publicize the settlement. Class Representative and Class Counsel agree not to  
25 respond to any press inquiries concerning the settlement except to refer reporters to  
26 the papers filed with the District Court.

27 64. Uncashed Settlement Checks. Any settlement checks that remain  
28 uncashed after 180 days of mailing will be considered *cy pres* funds and be donated

1 to charitable organizations to be jointly selected by the Parties and approved by the  
2 Court in connection with final approval of the Settlement.

3 65. Cooperation. The Parties agree to cooperate fully with one another to  
4 accomplish and implement the terms of this Settlement. Such cooperation shall  
5 include, but not be limited to, execution of such other documents and the taking of  
6 such other action as may reasonably be necessary to fulfill the terms of this  
7 Stipulation of Settlement. The Parties to this Settlement Agreement shall use their  
8 best efforts, including all efforts contemplated by this Settlement Agreement and any  
9 other efforts that may become necessary by Court order, or otherwise, to effectuate  
10 this Settlement Agreement and the terms set forth herein.

11 66. Extensions of Time. If a party cannot reasonably comply with an  
12 obligation under this Settlement Agreement by the deadline set forth herein  
13 applicable to that obligation, that party may apply to the Court for a reasonable  
14 extension of time to fulfill that obligation. Consent to such a request for an extension  
15 will not be unreasonably withheld by the other party.

16 67. No Impact on Benefit Plans. Neither the Settlement nor any amounts  
17 paid under the Settlement will modify any previously credited hours or service under  
18 any employee benefit plan, policy, or bonus program sponsored by Settling  
19 Defendants. Such amounts will not form the basis for additional contributions to,  
20 benefits under, or any other monetary entitlement under Settling Defendants'  
21 sponsored benefit plans, policies, or bonus programs. The payments made under the  
22 terms of this Stipulation shall not be applied retroactively, currently, or on a going  
23 forward basis, as salary, earnings, wages, or any other form of compensation for the  
24 purposes of any Settling Defendants' benefit plan, policy, or bonus program. Settling  
25 Defendants retain the right to modify the language of their benefit plans, policies and  
26 bonus programs to effect this intent, and to make clear that any amounts paid  
27 pursuant to this Settlement are not for "hours worked," "hours paid," "hours of  
28 service," or any similar measuring term as defined by applicable plans, policies and



1 bonus programs for purposes of eligibility, vesting, benefit accrual, or any other  
2 purpose, and that additional contributions or benefits are not required by this  
3 Stipulation of Settlement.

4 68. Class Action Fairness Act. Within five (5) days after all parties have  
5 executed this Agreement, Defendants shall serve upon the appropriate state official of  
6 each state in which a Class Member resides and the appropriate federal official, a  
7 notice of the proposed settlement consisting of the documents and information  
8 required by 28 U.S.C. § 1715(b). The costs of providing the notice required by 28  
9 U.S.C. § 1715(b) shall be included in the settlement administration costs to be paid  
10 from the Maximum Settlement Amount as per Paragraph 44(d) above.

11 69. Notices. Unless otherwise specifically provided herein, all notices,  
12 demands, or other communications given hereunder shall be in writing and shall be  
13 deemed to have been duly given as of the third business day after mailing by United  
14 States certified mail, return receipt requested, addressed as follows:

15 To the Plaintiff and the Plaintiff Class:

16 Kenneth S. Gaines, Esq.  
17 Daniel F. Gaines, Esq.  
18 Alex P. Katofsky, Esq.  
19 **Gaines & Gaines, APLC**  
20 21550 Oxnard Street, Suite 980  
21 Woodland Hills, CA 91367

22 To the Defendants:

23 Stephen E. Fox, Esq.  
24 John Michael Gaddis, Esq.  
25 **Fish & Richardson, P.C.**  
26 1717 Main Street, Suite 5000  
27 Dallas, TX 75201

28 70. Modification. This Stipulation may not be changed, altered, or  
modified, except in writing signed by counsel for the Parties hereto and approved by  
the Court. This Stipulation may not be discharged except by performance in  
accordance with its terms or by a writing used by the Parties hereto. This Stipulation



1 shall be binding upon and inure to the benefit of the Parties hereto and their  
2 respective heirs, trustees, executors, administrators, successors, and assigns.

3 71. Governing Law. The rights and obligations of the parties hereunder  
4 shall be construed and enforced in accordance with, and shall be governed by, the  
5 laws of the State of California, without regard to principles of conflict of laws.

6 72. Severability. If any provision of this Stipulation of Settlement or the  
7 application thereof is held invalid, such invalidation shall not affect other provisions  
8 or applications of this Stipulation of Settlement and to this end the provisions of this  
9 Stipulation of Settlement are declared to be severable.

10 73. Counterparts. Because the proposed Class has not yet been certified, and  
11 the members of the proposed Class are so numerous, the Parties agree that it is  
12 impossible or impractical to have each Class Member sign this Stipulation. It is  
13 agreed that, for purposes of seeking Court approval of the Settlement, this Stipulation  
14 of Settlement may be executed on behalf of the proposed Class by Class Counsel.  
15 This Settlement Agreement shall become effective upon its execution by all of the  
16 undersigned. The Settling Parties may execute this Settlement Agreement in any  
17 number of counterparts, and a facsimile signature shall have the same force and effect  
18 as an original.

19 IN WITNESS WHEREOF, this Stipulation of Settlement is executed by the  
20 Parties and their duly authorized attorneys, as of the day and year herein set forth.  
21  
22  
23  
24  
25  
26  
27  
28

DEFENDANTS:

Dated: January 11, 2012 CROSSMARK, INC.

By: John Thayer  
Its: CEO

Dated: January 11, 2012 CROSSMARK HOME  
IMPROVEMENT SERVICES, LLC.

By: John Thayer  
Its: President

Dated: January 11, 2012 CHI MANAGEMENT GROUP, LP  
By its General Partner  
CHI Management Group, LLC

By: John Thayer  
Its: President

Dated: January 11, 2012 FISH & RICHARDSON, L.P.

By: Stephen E. Fox  
Stephen E. Fox  
Attorneys for Defendants

PLAINTIFF:

Dated: January 11, 2012 ERICKA MITCHELL

By: \_\_\_\_\_  
Its: \_\_\_\_\_

Dated: January 11, 2012 GAINES & GAINES, APLC

By: \_\_\_\_\_  
Daniel F. Gaines  
Attorneys for Plaintiff

1 **DEFENDANTS:**

2 Dated: January 11, 2012 CROSSMARK, INC.

3  
4 By: \_\_\_\_\_  
Its: \_\_\_\_\_

5  
6 Dated: January 11, 2012 CROSSMARK HOME  
IMPROVEMENT SERVICES, LLC.

7  
8 By: \_\_\_\_\_  
Its: \_\_\_\_\_

9  
10 Dated: January 11, 2012 CHI MANAGEMENT GROUP, LP

11  
12 By: \_\_\_\_\_  
Its: \_\_\_\_\_

13  
14 Dated: January 11, 2012 FISH & RICHARDSON, L.P.

15  
16 By \_\_\_\_\_  
17 Stephen E. Fox  
Attorneys for Defendants

18 **PLAINTIFF:**

19 Dated: January 11, 2012 ERICKA MITCHELL

20  
21 By: \_\_\_\_\_  
Its: \_\_\_\_\_

22  
23 Dated: January 11, 2012 GAINES & GAINES, APLC

24  
25 By \_\_\_\_\_  
26 Daniel H. Gaines  
Attorneys for Plaintiff

**EXHIBIT "1"**

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ERICKA MITCHELL, on behalf of herself and  
all others similarly situated, and on behalf of the  
general public,

Plaintiff,

v.

CROSSMARK, INC., et. al.,

Defendants.

Case No. CV 11-2818-JAK (FMOx)

Assigned to the Hon. John A. Kronstadt

**NOTICE OF PENDENCY OF CLASS  
ACTION SETTLEMENT AND FINAL  
HEARING**

## YOU MAY BE ENTITLED TO RECEIVE MONEY FROM A SETTLEMENT

*A California court authorized this notice. This is not a solicitation from a lawyer.*

- A settlement will provide up to \$999,999.99 to pay claims to certain current and former California employees of Crossmark, Inc., Crossmark Home Improvement Services, LLC, and related companies (collectively, "CROSSMARK") who were employed by them between October 8, 2006 and \_\_\_\_\_, 2012.
- The settlement resolves a lawsuit over whether CROSSMARK: 1) failed to pay its employees all wages due (including wages earned driving between work locations), 2) failed to provide its employees with accurately itemized wage statements, 3) failed to timely pay its employees' wages, and 4) failed to fully reimburse its employees for all business expenses incurred. It avoids risks to you from continuing the lawsuit; pays money to employees; and releases CROSSMARK from liability.
- Court-appointed lawyers for the employees will ask the Court to award them up to \$315,000 as fees and expenses for investigating the facts, litigating the case, and negotiating the settlement. This will be paid from the maximum settlement amount.
- CROSSMARK deny these claims in their entirety. Indeed, CROSSMARK does not believe that any liability to Plaintiff or any prospective class members exists, or that Plaintiff or the prospective class members are entitled to any recovery. In addition, CROSSMARK contends that Plaintiff's claims are not suitable for class or representative treatment. Moreover, the two sides disagree on how much money could have been won if employees won at trial.
- Your legal rights are affected whether you act or don't act. Read this notice carefully.

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT</b>	
<b>Do Nothing</b>	Automatically receive a payment. You need not take any further action to be part of this case and be paid your share of the settlement.
<b>Exclude Yourself</b>	Get no payment. This is the only option that allows you to ever be part of any other lawsuit against Crossmark about the legal claims in this case.
<b>Object</b>	Write to the Court about why you don't like the settlement.
<b>Go to a Hearing</b>	Ask to speak in Court about the fairness of the settlement.

**WHY DID YOU RECEIVE THIS NOTICE?**

This notice explains a proposed settlement of a lawsuit, and informs you of your legal rights under that proposed settlement. You are receiving this notice because you may be a member of a class on whose behalf this class action lawsuit has been brought.

**WHAT IS THIS LAWSUIT ABOUT?**

On October 8, 2010, plaintiff Ericka Mitchell filed this lawsuit against CROSSMARK in Ventura County Superior Court. It was subsequently removed to the United States District Court for the Central District of California. The lawsuit alleges violations of the California Labor Code, Industrial Welfare Commission Wage Orders, and the California Business and Professions Code. The Lawsuit seeks to certify a class of all hourly, non-exempt employees who were employed by CROSSMARK from October 8, 2006 through \_\_\_\_\_, 2012 (the "Settlement Class"). The lawsuit alleges that members of the Settlement Class were not timely paid all wages owed, were required to incur business expenses for which they were not fully reimbursed, and seeks recovery of alleged unpaid wages, expense reimbursement, statutory and civil penalties, interest, attorneys' fees and costs. CROSSMARK denies all of the material allegations in the Lawsuit.

**SUMMARY OF THE SETTLEMENT**

**A. Why is there a Settlement?**

The Court did not decide in favor of Plaintiff or CROSSMARK. Plaintiff thinks she would have prevailed on her claims at a trial. CROSSMARK does not think that Plaintiff would have won anything from a trial. But there was no trial. Instead, both parties agreed to a settlement. That way, they avoid the costs, risks, and uncertainty of a trial, and the people affected will get compensation. Plaintiff and Plaintiff's attorneys think the settlement is fair, reasonable and adequate and in the best interests of all Class members.

**B. Who is in the Settlement Class?**

The class includes all current and former California employees of CROSSMARK who were employed as hourly, non-exempt employees at any time from October 8, 2006 through \_\_\_\_\_, 2012 and who do not opt out of the settlement.

**C. What does the Settlement provide?**

**1. Maximum Settlement Amount.**

CROSSMARK will pay \$999,999.99 (the "Maximum Settlement Amount") to settle the lawsuit. The following sums will be paid from the Maximum Settlement Amount: (1) \$25,000 to the California Labor and Workforce Development Agency; (2) Class Counsel's attorneys' fees in an amount set by the Court not to exceed \$300,000 and Class Counsel's documented litigation costs in an amount set by the Court not to exceed \$15,000; (3) a service payment to the Class Representative, for her services in the Action and for the release of her individual claims against CROSSMARK, in an amount set by the Court and not to exceed \$10,000; and (4) a reasonable amount set by the Court to the settlement administrator for administering the settlement, not to exceed \$45,000. The amount of the Maximum Settlement Amount remaining after these payments is the "Net Settlement Amount."

**2. Individual Payment Amount.**

Your share of the Net Settlement Amount will be determined by a formula which factors the number of weeks you worked for CROSSMARK as a non-exempt, hourly employee in California between October 8, 2006 and \_\_\_\_\_, 2012.



Case 2:11-cv-02818-JAK -FMO Document 69-2 Filed 01/16/12 Page 29 of 33 Page ID #:1280

According to the records of CROSSMARK, you were employed as a non-exempt, hourly employee in California for a total of [ ] work weeks between October 8, 2006 and \_\_\_\_\_, 2012. Based on these total workweeks, your estimated share of the settlement proceeds is \$\_\_\_\_\_, although this is subject to change based on the terms of the Court's final approval order.

NOTE: CROSSMARK's records will control unless you are able to provide documentation which establishes that its records are in error. If there is a dispute about whether CROSSMARK's information or yours is accurate, the court may be asked to resolve the dispute, and the court's decision will be final. For instructions on how to dispute your work weeks, see Option 1 below.

**D. What are you giving up to get a payment or stay in the Class?**

Upon the final approval of the settlement by the Court, by signing below, on behalf of myself and my heirs and administrators, I fully release and discharge CROSSMARK of any and all claims that were or could have been asserted in this Action based upon the facts alleged therein, and any and all claims, whether brought directly, representatively, or in any capacity, under any theory whatsoever, whether in tort, contract, statute, rule, ordinance, order, regulation, or otherwise, including state, federal, and local laws, whether for economic damages, non-economic damages; restitution, penalties, punitive damages, wages, premium payments, liquidated damages, attorneys' fees, or any other type of recovery thereon, arising out of any act, omission, transaction, or event that occurred or is alleged to have occurred up to the date of final approval of the settlement by the Court, to the extent that such claims arise out of the alleged facts, circumstances, and occurrences underlying the allegations as set forth in the Plaintiff's Complaint or in any Amended Complaint filed in this Action. Claims specifically included in this release, without limitation, include any and all claims arising under the IWC Wage Orders; California Labor Code, including, without limitation, §§ 510, 1194, 226, 201-203, 204, and 2802; California Business & Professions Code §§ 17200 *et seq.*; and any and all claims under the Private Attorney General Act (California Labor Code Sections 2698 *et seq.*) relating to the claims being released herein.

The Class Members' Released Claims provided by the Stipulation of Settlement include claims in any of the categories enumerated above which I do not know or suspect to exist in my favor against the Released Parties. I waive all rights and benefits afforded by section 1542 of the California Civil Code as to unknown claims in any of the categories enumerated above, and do so understanding the significance of that waiver. Section 1542 provides:

**"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."**

If you do not exclude yourself from the Class and the Settlement receives final approval from the Court, you will be bound by this release.

**THE SETTLEMENT HEARING**

The Court will conduct a final fairness hearing regarding the proposed settlement (the "Final Settlement Hearing") on \_\_\_\_\_, 2012, at \_\_\_\_\_, in Courtroom 750 of the United States District Court, Central District of California, located at \_\_\_\_\_, Los Angeles, California 90012. The Court will determine: (i) whether the lawsuit should be finally certified as a class action for settlement purposes; (ii) whether the settlement should be given the Court's final approval as fair, reasonable, adequate and in the best interests of the Settlement Class Members; (iii) whether the Settlement Class Members should be bound by the terms of the settlement; (iv) the amount of the attorneys' fees and expense award to Plaintiff's Attorneys; and (v) the amount that should be awarded to Plaintiff for class representative fees. At the Final Settlement Hearing, the Court will hear all properly filed objections, as well as arguments for and against the proposed settlement. You have a right to attend this hearing, but you are not required to do so. You also have the right to hire an attorney to represent you, or to enter an appearance and represent yourself.

**WHAT ARE YOUR OPTIONS?**• **OPTION 1 – DO NOTHING**

**IF YOU WISH TO REMAIN A SETTLEMENT CLASS MEMBER AND OBTAIN ANY SHARE OF THE SETTLEMENT THAT YOU MAY BE ENTITLED TO RECEIVE, THEN YOU DO NOT NEED TO DO ANYTHING AT THIS TIME. YOU ARE NEVER REQUIRED TO GO TO COURT OR PAY ANYTHING TO THE LAWYERS IN THIS CASE.** If you dispute the number of work weeks listed in Section C.2 above, or you have moved and want your settlement check mailed to a new address, send a letter and supporting documentation to: CROSSMARK Claims Administrator, \_\_\_\_\_, \_\_\_\_\_ (the "Claims Administrator"). Any address changes or challenges to your work weeks must be sent by regular U.S. mail to the Claims Administrator and postmarked no later than \_\_\_\_\_, 2012 [30 days after mailing]. If you move, it is your responsibility to keep a current address on file with the Claims Administrator.

• **OPTION 2 – OBJECT TO THE SETTLEMENT**

If you wish to remain a Settlement Class Member, but you object to the proposed settlement (or any of its terms) and wish the Court to consider your objection at the Final Settlement Hearing, you may object to the proposed settlement in writing. You may also appear at the Final Approval Hearing, either in person or through an attorney at your own expense, provided you notify the Court of your intent to do so. All written objections, supporting papers, and/or notices of intent to appear at the Final Approval Hearing must (a) clearly identify the case name, number, and judge, (b) be submitted to the Court, either by mailing it to Clerk of the Court, United States District Court, \_\_\_\_\_, Los Angeles, California 90012, by filing it in person at any location of the United States District Court, Central District of California that includes a facility for civil filings, or by filing it electronically through the government's online filing "PACER" system, and (c) be mailed to the law firms identified below, and (d) be mailed to the Claims Administrator. To be valid, objections must be filed and served on or before \_\_\_\_\_, 2012 [30 days after mailing].

**Plaintiff's Attorneys:**

Daniel F. Gaines, Esq.  
Kenneth S. Gaines, Esq.  
Alex P. Katofsky, Esq.  
Gaines & Gaines, APLC  
21550 Oxnard Street, Suite 980  
Woodland Hills, CA 91367

**Crossmark's Attorneys:**

Stephen A. Fox, Esq.  
John Michael Gaddis, Esq.  
Fish & Richardson P.C.  
1717 Main Street, Suite 5000  
Dallas, TX 75201

Scott A. Miller, Esq.  
Law Offices of Scott A. Miller, APC  
16133 Ventura Blvd., Suite 645  
Encino, CA 91436

Steven L. Miller, Esq.  
Steven L. Miller, APLC  
16133 Ventura Blvd., Suite 645  
Encino, CA 91436

• **OPTION 3 – EXCLUDE YOURSELF FROM THE SETTLEMENT**

You have a right to exclude yourself ("opt out") from the Settlement Class, but if you choose to do so, you will not receive any benefits from the proposed settlement. You will not be bound by a judgment in this case and you will have the right to file your own lawsuit against CROSSMARK and pursue your own claims in a separate suit. You can opt out of the Class by completely filling out and mailing the enclosed Exclusion Form to the

Case 2:11-cv-02818-JAK -FMO Document 69-2 Filed 01/16/12 Page 31 of 33 Page ID #:1282

Claims Administrator at the above-stated address, such that it is postmarked no later than \_\_\_\_\_, 2012 [30 days after mailing].

**ARE THERE MORE DETAILS ABOUT THE SETTLEMENT?**

The above is a summary of the basic terms of the settlement. For the precise terms and conditions of the settlement, you should review the detailed "Joint Stipulation of Settlement and Release" which is on file with the Clerk of the Court. The pleadings and other records in the Lawsuit may be examined at any time during regular business hours at the Office of the Clerk of the United States District Court, Central District of California, \_\_\_\_\_, Los Angeles, California 90012.

**ALL INQUIRIES REGARDING THIS LITIGATION SHOULD BE MADE TO PLAINTIFF'S ATTORNEYS:** Kenneth S. Gaines, Daniel F. Gaines, and Alex P. Katofsky, GAINES & GAINES, APLC, 21550 Oxnard Street, Suite 980, Woodland Hills, California 91367, Phone: (818) 703-8985.

**BY ORDER OF THE UNITED STATES DISTRICT COURT**

**EXHIBIT "2"**

[PRINTED ON GREEN PAPER]

**REQUEST FOR EXCLUSION**

**ONLY COMPLETE THIS REQUEST FOR EXCLUSION FORM IF YOU WANT TO OPT OUT OF (NOT PARTICIPATE IN) THE SETTLEMENT OF THE ACTION KNOWN AS ERICKA MITCHELL vs. CROSSMARK, INC, et al., UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA CASE NO. CV 11-2818-JAK (FMOx). IF YOU OPT OUT OF THE SETTLEMENT, YOU WILL NOT RECEIVE ANY PORTION OF THE SETTLEMENT AMOUNT.**

I confirm that I worked for CROSSMARK, Inc. or a related company as a non-exempt, hourly employee for some or all of the time period beginning October 8, 2006 and ending \_\_\_\_\_, 2012.

**I do not wish to receive any payment under the terms of the proposed class action settlement or to otherwise participate in the proposed settlement.**

Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Print Name: \_\_\_\_\_

Residence Street Address: \_\_\_\_\_

City, State and Zip Code: \_\_\_\_\_

**IN ORDER TO BE VALID, THIS REQUEST FOR EXCLUSION FORM MUST BE COMPLETED, SIGNED, MAILED BY FIRST CLASS MAIL, AND POSTMARKED ON OR BEFORE [30 days after mailing of Notice]. Send this signed request for exclusion form to the Claims Administrator:**

**CROSSMARK Settlement Administrator**

c/o \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

# EXHIBIT D



1 Rafael G. Nendel-Flores, Bar No. 223358  
2 rafael.nendelflores@ogletreedeakins.com  
3 Allison C. Eckstrom, Bar No. 217255  
4 Allison.eckstrom@ogletreedeakins.com  
5 Lara C. de Leon, Bar No. 270252  
6 lara.deleon@ogletreedeakins.com  
7 OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.  
8 Park Tower, Suite 1500  
9 695 Town Center Drive  
10 Costa Mesa, CA 92626  
11 Telephone: 714.800.7900  
12 Facsimile: 714.754.1298

13 Attorneys for Defendant CROSSMARK, INC.

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **FOR THE COUNTY OF LOS ANGELES**

16 GAYLE SMITH, an individually, and on behalf  
17 of other members of the general public similarly  
18 situated,

19 Plaintiff,

20 vs.

21 CROSSMARK, INC., a Delaware Corporation,  
22 and DOES 1-10, inclusive,

23 Defendant.

Case No. BC523981

[Assigned for all purposes to Honorable  
William F. Highberger, Dept. 307]

**DEFENDANT CROSSMARK, INC.'S  
NOTICE TO ADVERSE PARTY AND  
STATE COURT OF REMOVAL TO  
FEDERAL COURT**

Action Filed: October 9, 2013  
Trial Date: None Set

24 **TO THE CLRK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR**  
25 **THE COUNTY OF LOS ANGELES AND TO PLAINTIFF GAYLE SMITH AND HER**  
26 **ATTORNEYS OF RECORD:**

27 PLEASE TAKE NOTICE that on November 21, 2013, defendant CROSSMARK, INC.  
28 filed in the United States District Court for the Central District of California a Notice of Removal  
of this action. A true and correct copy of said Notice of Removal is attached hereto as Exhibit A.

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1 Defendant respectfully requests that this Court proceed no further in this action unless and until  
2 such time as the action may be remanded by order of the United States District Court for the  
3 Central District of California.

4  
5 DATED: November 21, 2013

OGLETREE, DEAKINS, NASH, SMOAK &  
STEWART, P.C.

6  
7  
8 By: 

Rafael G. Nendel-Flores  
Allison C. Eckstrom  
Lara C. de Leon

9  
10 Attorneys for Defendant CROSSMARK, INC.  
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**PROOF OF SERVICE***Gayle Smith v. CROSSMARK, Inc., et al.*

Case No. BC523981

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of Orange in the office of a member of the bar of this court at whose direction the service was made. My business address is Park Tower, Suite 1500, 695 Town Center Drive, Costa Mesa, CA 92626.

On November \_\_\_\_, 2013, I served the following document(s):

**DEFENDANT CROSSMARK, INC.'S NOTICE TO ADVERSE PARTY  
AND STATE COURT OF REMOVAL TO FEDERAL COURT**

by placing ☐ (the original) ☒ (a true copy thereof) in a sealed envelope addressed as follows:

Shawn C. Westrick  
Timothy P. Hennessy  
KAWAHITO SHRAGA & WESTRICK LLP  
1990 S. Bundy Drive, Suite 280  
Los Angeles, CA 90025  
Telephone: (310) 746-5300  
Facsimile: (310) 593-2520

*Attorneys for Plaintiff*

GAYLE SMITH

Email: [swestrick@kswlawyers.com](mailto:swestrick@kswlawyers.com)

[thennessy@kswlawyers.com](mailto:thennessy@kswlawyers.com)

☒ **BY MAIL:** I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.'s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **BY OVERNIGHT DELIVERY:** I placed the sealed envelope(s) or package(s) designated by the express service carrier for collection and overnight delivery by following the ordinary business practices of Ogletree, Deakins, Nash, Smoak & Stewart P.C., San Francisco, California. I am readily familiar with Ogletree, Deakins, Nash, Smoak & Stewart P.C.'s practice for collecting and processing of correspondence for overnight delivery, said practice being that, in the ordinary course of business, correspondence for overnight delivery is deposited with delivery fees paid or provided for at the carrier's express service offices for next-day delivery.

☒ **(STATE):** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November \_\_\_\_, 2013, at Costa Mesa, CA.

Diane Vo

Type or Print Name

Signature

16503978.1

**CERTIFICATE OF SERVICE***Gayle Smith v. Crossmark, Inc., et al.*

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of Orange in the office of a member of the bar of this court at whose direction the service was made. My business address is Park Tower, Suite 1500, 695 Town Center Drive, Costa Mesa, CA 92626.

On November 21, 2013, I served the following document(s):

**DEFENDANT CROSSMARK, INC.'S NOTICE OF REMOVAL**

by placing ☐ (the original) ☒ (a true copy thereof) in a sealed envelope addressed as follows:

Shawn C. Westrick  
 Timothy P. Hennessy  
 KAWAHITO SHRAGA & WESTRICK LLP  
 1990 S. Bundy Drive, Suite 280  
 Los Angeles, CA 90025  
 Telephone: (310) 746-5300  
 Facsimile: (310) 593-2520

*Attorneys for Plaintiff*

GAYLE SMITH

swestrick@kswlawyers.com

thennessy@kswlawyers.com

☒ **BY MAIL:** I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.'s practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☒ **(Federal)** I declare that I am employed in the office of a member of the State Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on November 21, 2013, at Costa Mesa, CA.

Diane Vo  
 Type or Print Name

  
 Signature



COPY

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA  
CIVIL COVER SHEET

<b>I. (a) PLAINTIFFS</b> ( Check box if you are representing yourself <input type="checkbox"/> )  GAYLE SMITH, an individually, and on behalf of other members of the general public similarly situated,	<b>DEFENDANTS</b> ( Check box if you are representing yourself <input type="checkbox"/> )  CROSSMARK, INC., a Delaware Corporation, and DOES 1-10, inclusive.
<b>(b) County of Residence of First Listed Plaintiff</b> <u>Los Angeles</u> (EXCEPT IN U.S. PLAINTIFF CASES)	<b>County of Residence of First Listed Defendant</b> _____ (IN U.S. PLAINTIFF CASES ONLY)
<b>(c) Attorneys (Firm Name, Address and Telephone Number)</b> If you are representing yourself, provide the same information. Shawn C. Westrick / Timothy P. Hennessy KAWAHITO SHRAGA & WESTRICK LLP 1990 S. Bundy Drive, Suite 280 Los Angeles, CA 90025, Tel. (310) 746-5300 / Fax (310) 593-2520	<b>Attorneys (Firm Name, Address and Telephone Number)</b> If you are representing yourself, provide the same information. Rafael G. Nendel-Flores / Allison C. Eckstrom / Lara C. de Leon OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C. 695 Town Center Drive, Ste. 1500, Costa Mesa, CA 92626 (Tel) (714) 800-7800 / Fax: (714) 754-1298

<b>II. BASIS OF JURISDICTION</b> (Place an X in one box only.)  <input type="checkbox"/> 1. U.S. Government Plaintiff <input type="checkbox"/> 3. Federal Question (U.S. Government Not a Party)  <input type="checkbox"/> 2. U.S. Government Defendant <input checked="" type="checkbox"/> 4. Diversity (Indicate Citizenship of Parties in Item III)	<b>III. CITIZENSHIP OF PRINCIPAL PARTIES-For Diversity Cases Only</b> (Place an X in one box for plaintiff and one for defendant) <table style="width:100%;"> <tr> <td style="width:33%;">Citizen of This State</td> <td style="width:10%;">PTF <input checked="" type="checkbox"/> 1</td> <td style="width:10%;">DEF <input type="checkbox"/> 1</td> <td style="width:33%;">Incorporated or Principal Place of Business in this State</td> <td style="width:10%;">PTF <input type="checkbox"/> 4</td> <td style="width:10%;">DEF <input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td><input type="checkbox"/> 5</td> <td><input checked="" type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>	Citizen of This State	PTF <input checked="" type="checkbox"/> 1	DEF <input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	PTF <input type="checkbox"/> 4	DEF <input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
Citizen of This State	PTF <input checked="" type="checkbox"/> 1	DEF <input type="checkbox"/> 1	Incorporated or Principal Place of Business in this State	PTF <input type="checkbox"/> 4	DEF <input type="checkbox"/> 4														
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5														
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6														

<b>IV. ORIGIN</b> (Place an X in one box only.) <input type="checkbox"/> 1. Original Proceeding <input checked="" type="checkbox"/> 2. Removed from State Court <input type="checkbox"/> 3. Remanded from Appellate Court <input type="checkbox"/> 4. Reinstated or Reopened <input type="checkbox"/> 5. Transferred from Another District (Specify) <input type="checkbox"/> 6. Multi-District Litigation
---

**V. REQUESTED IN COMPLAINT: JURY DEMAND:** ☒ Yes ☐ No (Check "Yes" only if demanded in complaint.)

**CLASS ACTION under F.R.Cv.P. 23:** ☒ Yes ☐ No      ☒ **MONEY DEMANDED IN COMPLAINT:** \$ Unspecified

**VI. CAUSE OF ACTION** (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause. Do not cite jurisdictional statutes unless diversity.)  
 Class Action Fairness Act (28 U.S.C. §§ 1332(d))

**VII. NATURE OF SUIT** (Place an X in one box only.)

OTHER STATUTES	CONTRACT	REAL PROPERTY CONT.	IMMIGRATION	PRISONER PETITIONS	PROPERTY RIGHTS
<input type="checkbox"/> 375 False Claims Act	<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 462 Naturalization Application	<b>Habeas Corpus:</b>	<input type="checkbox"/> 820 Copyrights
<input type="checkbox"/> 400 State Reapportionment	<input type="checkbox"/> 120 Marine	<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 463 Alien Detainee	<input type="checkbox"/> 830 Patent
<input type="checkbox"/> 410 Antitrust	<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 290 All Other Real Property	<b>TORTS</b>	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 840 Trademark
<input type="checkbox"/> 430 Banks and Banking	<input type="checkbox"/> 140 Negotiable Instrument	<b>PERSONAL INJURY</b>	<b>PERSONAL PROPERTY</b>	<input type="checkbox"/> 530 General	<b>SOCIAL SECURITY</b>
<input type="checkbox"/> 450 Commerce/ICC Rates/Etc.	<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 861 HIA (1395ff)
<input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 371 Truth in Lending	<b>Other:</b>	<input type="checkbox"/> 862 Black Lung (923)
<input type="checkbox"/> 470 Racketeer Influenced & Corrupt Org.	<input type="checkbox"/> 152 Recovery of Defaulted Student Loan (Excl. Vet.)	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 540 Mandamus/Other	<input type="checkbox"/> 863 DIWC/DIWW (405 (g))
<input type="checkbox"/> 480 Consumer Credit	<input type="checkbox"/> 153 Recovery of Overpayment of Vet. Benefits	<input type="checkbox"/> 330 Fed. Employers' Liability	<input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 864 SSID Title XVI
<input type="checkbox"/> 490 Cable/Sat TV	<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 340 Marine	<b>BANKRUPTCY</b>	<input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 865 RSI (405 (g))
<input type="checkbox"/> 850 Securities/Commodities/Exchange	<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 345 Marine Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 560 Civil Detainee Conditions of Confinement	<b>FEDERAL TAX SUITS</b>
<input type="checkbox"/> 890 Other Statutory Actions	<input type="checkbox"/> 195 Contract Product Liability	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<b>FORFEITURE/PENALTY</b>	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)
<input type="checkbox"/> 891 Agricultural Acts	<input type="checkbox"/> 196 Franchise	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<b>CIVIL RIGHTS</b>	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 871 IRS-Third Party 26 USC 7609
<input type="checkbox"/> 893 Environmental Matters	<b>REAL PROPERTY</b>	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 690 Other	
<input type="checkbox"/> 895 Freedom of Info. Act	<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 362 Personal Injury-Med Malpractice	<input type="checkbox"/> 441 Voting	<b>LABOR</b>	
<input type="checkbox"/> 896 Arbitration	<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 365 Personal Injury-Product Liability	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> 710 Fair Labor Standards Act	
<input type="checkbox"/> 899 Admin. Procedures Act/Review of Appeal of Agency Decision	<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 720 Labor/Mgmt. Relations	
<input type="checkbox"/> 950 Constitutionality of State Statutes		<input type="checkbox"/> 368 Asbestos Personal Injury	<input type="checkbox"/> 445 American with Disabilities-Employment	<input type="checkbox"/> 740 Railway Labor Act	
		<input type="checkbox"/> 448 Education	<input type="checkbox"/> 446 American with Disabilities-Other	<input type="checkbox"/> 751 Family and Medical Leave Act	
			<input type="checkbox"/> 448 Education	<input checked="" type="checkbox"/> 790 Other Labor Litigation	
				<input type="checkbox"/> 791 Employee Ret. Inc. Security Act	

FOR OFFICE USE ONLY:

Case Number:

CV13-08624

CIVIL COVER SHEET

Page 1 of 3

CV-71 (11/13)

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA  
CIVIL COVER SHEET**

**VIII. VENUE:** Your answers to the questions below will determine the division of the Court to which this case will most likely be initially assigned. This initial assignment is subject to change, in accordance with the Court's General Orders, upon review by the Court of your Complaint or Notice of Removal.

<b>Question A: Was this case removed from state court?</b> <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No  If "no," go to Question B. If "yes," check the box to the right that applies, enter the corresponding division in response to Question D, below, and skip to Section IX.	<b>STATE CASE WAS PENDING IN THE COUNTY OF:</b>		<b>INITIAL DIVISION IN CACD IS:</b>
	<input checked="" type="checkbox"/> Los Angeles		Western
	<input type="checkbox"/> Ventura, Santa Barbara, or San Luis Obispo		Western
	<input type="checkbox"/> Orange		Southern
	<input type="checkbox"/> Riverside or San Bernardino		Eastern

<b>Question B: Is the United States, or one of its agencies or employees, a party to this action?</b> <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No  If "no," go to Question C. If "yes," check the box to the right that applies, enter the corresponding division in response to Question D, below, and skip to Section IX.	<b>If the United States, or one of its agencies or employees, is a party, is it:</b>		<b>INITIAL DIVISION IN CACD IS:</b>
	<b>A PLAINTIFF?</b>	<b>A DEFENDANT?</b>	
	Then check the box below for the county in which the majority of DEFENDANTS reside.	Then check the box below for the county in which the majority of PLAINTIFFS reside.	
	<input type="checkbox"/> Los Angeles	<input type="checkbox"/> Los Angeles	Western
	<input type="checkbox"/> Ventura, Santa Barbara, or San Luis Obispo	<input type="checkbox"/> Ventura, Santa Barbara, or San Luis Obispo	Western
	<input type="checkbox"/> Orange	<input type="checkbox"/> Orange	Southern
	<input type="checkbox"/> Riverside or San Bernardino	<input type="checkbox"/> Riverside or San Bernardino	Eastern
<input type="checkbox"/> Other	<input type="checkbox"/> Other	Western	

<b>Question C: Location of plaintiffs, defendants, and claims?</b> (Make only one selection per row)	<b>A.</b> Los Angeles County	<b>B.</b> Ventura, Santa Barbara, or San Luis Obispo Counties	<b>C.</b> Orange County	<b>D.</b> Riverside or San Bernardino Counties	<b>E.</b> Outside the Central District of California	<b>F.</b> Other
Indicate the location in which a majority of plaintiffs reside:	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Indicate the location in which a majority of defendants reside:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Indicate the location in which a majority of claims arose:	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

<b>C.1. Is either of the following true? If so, check the one that applies:</b>  <input type="checkbox"/> 2 or more answers in Column C <input type="checkbox"/> only 1 answer in Column C and no answers in Column D  Your case will initially be assigned to the SOUTHERN DIVISION. Enter "Southern" in response to Question D, below.  If none applies, answer question C2 to the right. →	<b>C.2. Is either of the following true? If so, check the one that applies:</b>  <input type="checkbox"/> 2 or more answers in Column D <input type="checkbox"/> only 1 answer in Column D and no answers in Column C  Your case will initially be assigned to the EASTERN DIVISION. Enter "Eastern" in response to Question D, below.  If none applies, go to the box below. ↓
Your case will initially be assigned to the WESTERN DIVISION. Enter "Western" in response to Question D below.	

<b>Question D: Initial Division?</b>	<b>INITIAL DIVISION IN CACD</b>
Enter the Initial division determined by Question A, B, or C above: →	Western Division



UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA  
CIVIL COVER SHEETIX(a). IDENTICAL CASES: Has this action been previously filed in this court and dismissed, remanded or closed? ☒ NO ☐ YES

If yes, list case number(s): \_\_\_\_\_

IX(b). RELATED CASES: Have any cases been previously filed in this court that are related to the present case? ☐ NO ☒ YES

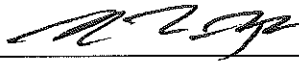
If yes, list case number(s): Mitchell v. Crossmark, Inc., Case No. CV11-2818-JAK (FMOx)

## Civil cases are deemed related if a previously filed case and the present case:

- (Check all boxes that apply) ☒ A. Arise from the same or closely related transactions, happenings, or events; or
- ☒ B. Call for determination of the same or substantially related or similar questions of law and fact; or
- ☐ C. For other reasons would entail substantial duplication of labor if heard by different judges; or
- ☐ D. Involve the same patent, trademark or copyright, and one of the factors identified above in a, b or c also is present.

## X. SIGNATURE OF ATTORNEY

(OR SELF-REPRESENTED LITIGANT): Rafael Nendel-Flores



DATE: November 21, 2013

**Notice to Counsel/Parties:** The CV-71 (JS-44) Civil Cover Sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law. This form, approved by the Judicial Conference of the United States in September 1974, is required pursuant to Local Rule 3-1 is not filed but is used by the Clerk of the Court for the purpose of statistics, venue and initiating the civil docket sheet. (For more detailed instructions, see separate instructions sheet).

## Key to Statistical codes relating to Social Security Cases:

Nature of Suit Code	Abbreviation	Substantive Statement of Cause of Action
861	HIA	All claims for health insurance benefits (Medicare) under Title 18, Part A, of the Social Security Act, as amended. Also, include claims by hospitals, skilled nursing facilities, etc., for certification as providers of services under the program. (42 U.S.C. 1935FF(b))
862	BL	All claims for "Black Lung" benefits under Title 4, Part B, of the Federal Coal Mine Health and Safety Act of 1969. (30 U.S.C. 923)
863	DIWC	All claims filed by insured workers for disability insurance benefits under Title 2 of the Social Security Act, as amended; plus all claims filed for child's insurance benefits based on disability. (42 U.S.C. 405 (g))
863	DIWW	All claims filed for widows or widowers insurance benefits based on disability under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405 (g))
864	SSID	All claims for supplemental security income payments based upon disability filed under Title 16 of the Social Security Act, as amended.
865	RSI	All claims for retirement (old age) and survivors benefits under Title 2 of the Social Security Act, as amended. (42 U.S.C. 405 (g))

**CERTIFICATE OF SERVICE**  
*Smith v. Crossmark, Inc.*

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of Orange in the office of a member of the bar of this court at whose direction the service was made. My business address is 695 Town Center Drive, Suite 1500, Costa Mesa, CA 92626.

On November 21, 2013, I served the following document(s), described as:

**CIVIL COVER SHEET**

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I declare that I am employed in the office of a member of the State Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on November 21, 2013, at Costa Mesa, California.

Diane Vo  
Type or Print Name

  
Signature

**SERVICE LIST**  
*Smith v. Crossmark, Inc.*

Shawn C. Westrick  
Timothy P. Hennessy  
KAWAHITO SHRAGA & WESTRICK LLP  
1990 S. Bundy Drive, Suite 280  
Los Angeles, CA 90025  
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*Attorneys for Plaintiff*  
GAYLE SMITH

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[thennessy@kswlawyers.com](mailto:thennessy@kswlawyers.com)

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